No. 00-927-CFX Title: Elaine L. Chao, Secretary of Labor, Petitioner
v.
Mallard Bay Drilling, Inc.

Docketed: December 7, 2000 Court: United States Court of Appeals for the Fifth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Oct 27 2000 | Application (00A364) to extend the time to file a petition for a writ of certiorari from November 6, 2000 to December 6, 2000, submitted to Justice Scalia. |
| | Oct 27 2000 | Application (00A364) granted by Justice Scalia extending the time to file until December 6, 2000. |
| | Dec 6 2000 | Petition for writ of certiorari filed. (Response due January 6, 2001) |
| | Jan 8 2001 | Brief of respondent Mallard Bay Drilling, Inc. in opposition filed. |
| | Jan 24 2001 | DISTRIBUTED for Conference of February 16, 2001 |
| | Jan 24 2001 | Reply brief of petitioner Henry Solano, Acting Secretary of Labor filed. |
| | Feb 20 2001 | Petition GRANTED.<br>SET FOR ARGUMENT October 31, 2001.<br>********** |
| | Mar 6 2001 | Record filed. |
| | Mar 8 2001 | Order extending time to file petitioner's brief on the merits to and including May 7, 2001. |
| | May 3 2001 | Motion of the Acting Solicitor General to dispense with printing the joint appendix filed. |
| | May 4 2001 | Brief amicus curiae of Association of Trial Lawyers of America filed. |
| | May 7 2001 | Brief of petitioner Elaine Chao, Secretary of Labor filed. |
| | May 10 2001 | Motion of the Acting Solicitor General for leave to dispense with printing the joint appendix DISTRIBUTED. |
| | May 14 2001 | Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED. |
| | Jun 8 2001 | Brief amici curiae of Associated General Contractors of America, et al. filed. |
| | Jun 8 2001 | Brief amicus curiae of American Waterways Operators filed. |
| | Jun 11 2001 | Brief amicus curiae of Transportation Institute filed. |
| | Jun 11 2001 | Brief of respondent Mallard Bay Drilling, Inc. filed. |
| | Jul 16 2001 | Reply brief of petitioner Elaine L. Chao, Secretary of Labor filed. |
| | Aug 14 2001 | CIRCULATED. |
| | Oct 31 2001 | ARGUED. |

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

ALEXIS M. HERMAN, SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Coast Guard has "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" concerning the "working conditions of employees" (29 U.S.C. 653(b)(1)) on "uninspected vessels" (46 U.S.C. 2101(43)) so as to displace application of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

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# In the Supreme Court of the United States

No.

ALEXIS M. HERMAN, SECRETARY OF LABOR,
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*v.*

MALLARD BAY DRILLING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 212 F.3d 898. The decision of the Occupational Safety and Health Review Commission (App., *infra*, 8a-21a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 2, 2000. A petition for rehearing was denied on August 8, 2000 (App., *infra*, 66a-67a). On October 27, 2000, Justice Scalia extended the time within which to

file a petition for a writ of certiorari to and including December 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), provides, in relevant part:

> Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

## STATEMENT

1. a. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). Each employer covered by the Act has a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). Each employer must also comply with applicable occupational safety and health standards promulgated by the Secretary of Labor. 29 U.S.C. 654(a)(2). The Secretary has delegated her authority under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). See 65 Fed. Reg. 50,017 (2000).

The OSH Act applies to "employment performed in a workplace in a State," as well as in specified territories and "Outer Continental Shelf lands." 29 U.S.C. 653(a).



When the Act was passed, certain federal agencies already had statutory authority to regulate the occupational safety and health of employees in particular fields, such as transportation and mining. To avoid duplication of effort, Congress provided in Section 4(b)(1) of the Act that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

OSHA regulations explain that:

> Section 4(b)(1) of the Act provides that the statute shall be inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions. Therefore, a person may be considered an employer covered by the Act, and yet standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority.

29 C.F.R. 1975.1(b). The regulations further explain that "Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection." 29 C.F.R. 1975.3(c).

b. The United States Coast Guard "administer[s] laws and promulgate[s] and enforce[s] regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not

specifically delegated by law to some other executive department." 14 U.S.C. 2. The extent of the Coast Guard's statutory authority over a vessel depends in large part on whether the vessel is "inspected" or "uninspected." See generally 46 U.S.C. 2101 *et seq.*, Subtit. II (vessels and seamen). "Inspected" vessels, listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998), include, for example, freight vessels, passenger vessels, seagoing motor vessels, tank vessels and certain types of barges. See also 46 U.S.C. 2101 (1994 & Supp. IV 1998) (definitions of different vessel types). "Uninspected vessels" are vessels not subject to inspection under Section 3301 that are not recreational vessels. 46 U.S.C. 2101(43).

"[T]o secure the safety of individuals and property on board" inspected vessels, the Secretary of Transportation has comprehensive rulemaking authority over those vessels, including their design, construction, alteration, repair, and operation. 46 U.S.C. 3306 (1994 & Supp. IV 1998). The Coast Guard has exercised that authority on behalf of the Secretary by issuing comprehensive regulations. See generally 46 C.F.R. Ch. I; 49 U.S.C. 108(b) (Commandant of Coast Guard shall exercise powers delegated by Secretary of Transportation); 49 C.F.R. 1.46(b) (delegating authority to the Commandant). In contrast to its broad authority over inspected vessels, the Coast Guard's statutory authority to issue regulations for uninspected vessels is limited to specific topics, including fire extinguishers, life preservers, flame arrestors or backfire traps, ventilation, and emergency locating equipment. 46 U.S.C. 4102 (1994 & Supp. IV 1998). Coast Guard regulations therefore cover only a limited range of health and safety hazards on only certain uninspected vessels. See 46 C.F.R. Pts. 24-26. The Coast Guard has not



regulated hazards related to oil drilling operations on uninspected vessels.[1]

In light of those statutory and regulatory provisions, OSHA and the Coast Guard have entered into a memorandum of understanding (MOU) that clarifies the division of authority over working conditions on vessels. 48 Fed. Reg. 11,365 (1983) (*reprinted in* App., *infra*, 62a-65a). The MOU explains that the Coast Guard generally has exclusive authority over the working conditions of seamen aboard inspected vessels. App., *infra*, 63a. The MOU specifically states that it does not apply to uninspected vessels. *Id.* at 62a. OSHA generally exercises authority over such vessels unless a Coast Guard regulation applies to the specific working condition at issue. See OSHA Instruction CPL 2-1.20(R) at 14 (Nov. 8, 1996).

2. a. Respondent Mallard Bay Drilling, Inc., conducts oil and gas drilling operations. App., *infra*, 10a. On June 16, 1997, four of respondent's employees were killed and two others seriously injured in an explosion on a drilling barge located on Little Bayou Pigeon, a navigable waterway within the State of Louisiana. *Id.* at 2a. The drilling barge was classified by the Coast Guard as an uninspected vessel. *Id.* at 6a, 27a. Near the end of the drilling operation, the well blew out. *Id.* at 11a. The off-duty crew evacuated, but the on-duty crew stayed aboard in an unsuccessful attempt to regain control of the well. *Id.* at 23a. Thirty to forty minutes later, the explosion occurred. *Id.* at 32a.

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[1] The Coast Guard is also authorized to require reporting and to conduct investigations of marine casualties involving both inspected and uninspected vessels. 46 U.S.C. 6101-6104, 6301-6308 (1994 & Supp. IV 1998). The Coast Guard has exercised that authority. See 46 C.F.R. Pt. 4.

The Coast Guard conducted a marine casualty investigation of the incident. See note 1, *supra*. The Coast Guard determined that explosive concentrations of natural gas had spread throughout the barge as a result of the blowout. App., *infra*, 32a. It found that the explosion most likely originated in the pump room, where a motor was operating that could have produced sparks to ignite the natural gas. *Id.* at 34a-35a. The Coast Guard concluded that respondent had not issued any specific directions regarding blowout control; that respondent's supervisors had not followed respondent's existing emergency procedures; and that they had not recognized the hazard of explosive gas accumulations on the rig and had not ordered the evacuation of on-duty personnel. *Id.* at 48a-50a. Because the Coast Guard lacked regulations governing those matters, it took no enforcement action and referred the matter to OSHA. *Id.* at 12a, 24a-25a.

Based on the report and other information from the Coast Guard, OSHA cited respondent for three violations of the OSH Act. App., *infra*, 2a. OSHA alleged that respondent had violated the Act's general duty clause, 29 U.S.C. 654(a), by failing to evacuate employees in a timely manner after the well blowout. App., *infra*, 9a. OSHA also alleged that respondent had violated particular OSHA standards by failing to develop and to implement an emergency response plan, as required by 29 C.F.R. 1910.120(q)(1), and by failing to train employees in emergency response, as required by 29 C.F.R. 1910.120(q)(6). App., *infra*, 9a.

b. Respondent did not contest the merits of the citation but argued before the Occupational Safety and Health Review Commission (Commission) that respondent was not subject to the OSH Act for two reasons. First, respondent contended that the drilling barge was



not a "workplace in a State" under 29 U.S.C. 653(a); and, second, respondent argued that the Coast Guard regulatory scheme rendered the OSH Act inapplicable under 29 U.S.C. 653(b)(1). App., *infra*, 2a.

The administrative law judge (ALJ) affirmed the citation. App., *infra*, 8a-19a. The ALJ held that the barge was a "workplace in a State" because it was located within the territorial boundaries of Louisiana. *Id.* at 12a-13a. With respect to preemption of OSHA authority under 29 U.S.C. 653(b)(1), the ALJ held that OSHA jurisdiction is preempted only as to those working conditions actually covered by another agency's regulations. App., *infra*, 14a-15a. Because respondent made no showing that any Coast Guard regulations address evacuation and emergency response to hazardous substance releases on uninspected vessels, *id.* at 15a, 16a, the ALJ concluded that the Coast Guard had not exercised authority to regulate the working conditions at issue and that OSHA jurisdiction was therefore not preempted under 29 U.S.C. 653(b)(1). App., *infra*, 18a. The Commission declined review, and the ALJ decision became final agency action. *Id.* at 20a-21a (citing 29 U.S.C. 661(j)).

c. Respondent sought review of the Commission's decision in the United States Court of Appeals for the Fifth Circuit, which reversed. App., *infra*, 1a-7a. The court of appeals held that OSHA lacks authority to regulate the working conditions of respondent's employees under 29 U.S.C. 653(b)(1), App., *infra*, 3a, 7a, and therefore the court declined to address respondent's contention that the barge was not a "workplace in a State" within the meaning of 29 U.S.C. 653(a), App., *infra*, 7a.

The court noted that, under Fifth Circuit precedent, "OSHA regulations do not apply to *working conditions*

of *seamen* on *vessels* in navigation" because "the Coast Guard has exclusive authority over the working conditions of seamen." App., *infra*, 3a-4a (citing *Donovan* v. *Texaco Inc.*, 720 F.2d 825, 826 (5th Cir. 1983), and *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120, 1121 (5th Cir. 1980)). The court rejected OSHA's contention that those cases were distinguishable because they involved inspected, rather than uninspected, vessels. App., *infra*, 4a-6a. The court found "no indication from *Clary* that the barge in that case was inspected," and the court emphasized that "the broad language of *Clary* does not turn on any such distinction." *Id.* at 5a.[2] The court noted that the Coast Guard is expressly authorized by 46 U.S.C. 4102 (1994 & Supp. IV 1998) to issue certain safety regulations for uninspected vessels and that the Coast Guard has exercised that authority. App., *infra*, 5a-6a (citing 46 C.F.R. 25.01 *et seq.* and 46 C.F.R. 26.01 *et seq.*). The court of appeals therefore reaffirmed its conclusion in *Texaco* that "the Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry-wide exemption [from OSHA] for seamen serving on vessels operating on navigable waters." *Id.* at 6a (quoting *Texaco*, 720 F.2d at 826).[3]

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[2] In fact, the vessel in *Clary* was a mobile offshore drilling unit operating on the outer continental shelf. *Clary* v. *Ocean Drilling & Exploration Co.*, 429 F. Supp. 905, 906 (W.D. La. 1977), aff'd, 609 F.2d 1120, 1122 (5th Cir. 1980). As such, it was a "seagoing barge[]" subject to inspection under 46 U.S.C. 395 (1976), the predecessor to 46 U.S.C. 3301(6).

[3] *Texaco* also involved a vessel (an oil tanker) subject to Coast Guard inspection. See *Donovan* v. *Texaco, Inc.*, 535 F. Supp. 641, 642 (E.D. Tex. 1982), aff'd, 720 F.2d 825 (5th Cir. 1983).



## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that the Occupational Safety and Health Act does not apply to the working conditions of seamen aboard uninspected vessels squarely conflicts with the holdings of three other courts of appeals. More generally, the decision departs from the well-established consensus of other courts of appeals that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), does not confer an industry-wide exception to the Act's coverage based on limited regulation of employees in that industry by another agency. The court of appeals' erroneous interpretation of Section 4(b)(1) is inconsistent with its text, the history surrounding its enactment, its long-standing interpretation by the Secretary, and the purpose of the OSH Act. Finally, the decision leaves thousands of crew members on uninspected vessels within the jurisdiction of the Fifth Circuit without protection from serious health and safety hazards. This Court's review is therefore warranted.

1. In holding that the OSH Act does not apply to the working conditions of employees on uninspected vessels, the Fifth Circuit has created a conflict with the decisions of the three other courts of appeals that have addressed the same question. The Second, Ninth, and Eleventh Circuits have each upheld OSHA regulation of working conditions on uninspected vessels. See *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1244-1245 (9th Cir. 1998); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1531 (11th Cir.), cert. denied, 479 U.S. 883 (1986); *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 780 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

In *Red Star*, the Second Circuit held that OSHA could regulate noise aboard an uninspected vessel because the noise was a working condition that was not regulated by the Coast Guard. 739 F.2d at 778-780. The court explained that "the Coast Guard's regulation of uninspected vessels is limited to only a few areas," and it is therefore not "exercising jurisdiction sufficient to regulate comprehensively the working conditions of employees aboard uninspected vessels." *Id.* at 780. "Since the Coast Guard is not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act," the court held, "OSHA may regulate noise hazards aboard uninspected vessels." *Ibid.* Similarly, in *Norfolk Dredging*, the Eleventh Circuit held that "the Coast Guard's regulation of safety aboard uninspected vessels is so circumscribed that it does not preempt OSHA's jurisdiction over crane safety aboard uninspected vessels." 783 F.2d at 1531. The court explained that, under Section 4(b)(1), OSHA jurisdiction is displaced only when another agency "either promulgate[s] regulations governing the working condition at issue, or articulate[s] a policy that the condition not be regulated." *Id.* at 1530. Finally, in *Tidewater Pacific*, the Ninth Circuit "agree[d] with the Secretary, the Commission, and the Second and Eleventh Circuits that the Coast Guard regulation of uninspected vessels does not preempt [OSHA] jurisdiction" (160 F.3d at 1245) in a case in which the "Coast Guard has not issued specific regulations governing the subjects of the [OSH Act] citation" (*id.* at 1243).

Those decisions are applications of the more general understanding that Section 4(b)(1) does not authorize exemptions of entire industries from OSH Act coverage based on limited regulation by another agency. That view is shared not only by the Courts of Appeals for the



Second, Ninth, and Eleventh Circuits but also by the Courts of Appeals for the District of Columbia and Fourth Circuits. See *Tidewater Pac.*, 160 F.3d at 1245; *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778; *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1053-1054 (D.C. Cir. 1976) (per curiam); *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976). As the Second Circuit has explained, those "decisions teach that section 4(b)(1) was not intended to create industry-wide exemptions based on isolated or narrow exercises of statutory authority." *Red Star*, 739 F.2d at 778.[4]

Fifteen years ago, the government opposed this Court's review in *Red Star* and *Norfolk Dredging* because there was not then a square conflict in the circuits regarding OSHA jurisdiction over uninspected vessels. See 86-28 Br. in Opp. at 10-11, 13 in *Norfolk Dredging Co.* v. *Secretary of Labor*, *supra*; 84-590 Br. in Opp. at 10-11 in *Red Star Marine Servs., Inc.* v. *Donovan*, *supra*. At that time, the Fifth Circuit had already decided *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (1980), and *Donovan* v. *Texaco Inc.*, 720 F.2d 825, 826 (1983), on which the court of appeals relied in this case. The Second and Eleventh Circuits had, however, found that the facts of those cases were distinguishable. See *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778-779. Moreover, because *Clary* and *Texaco* involved inspected vessels (see notes 2 & 3, *supra*), the government believed that those decisions spoke only to OSHA authority over working conditions

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[4] Indeed, the Fifth Circuit itself espoused the same view nearly a quarter century ago in a case concerning the railway industry. See *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 390 (1976), cert. denied, 434 U.S. 874 (1977).

on inspected vessels and did not address OSHA authority concerning uninspected vessels. See App., *infra*., 4a-5a. The Fifth Circuit, however, has now rejected any distinction of those cases based on the fact that they involved inspected vessels and has held that OSHA lacks authority over all working conditions of seamen on all vessels in navigation, including uninspected vessels. See *id.* at 3a-5a; see also *id.* at 66a-67a (denying petition for rehearing en banc). As a result, it is now appropriate for this Court to resolve the conflict created by the Fifth Circuit's decision.

2. The Fifth Circuit's decision is incorrect. The court's holding that OSHA lacks authority over all working conditions of seamen on all vessels in navigation, including uninspected vessels, rests on an interpretation of Section 4(b)(1) that is inconsistent with its text, the history surrounding its enactment, the Secretary of Labor's long-standing interpretation of the Section, and the purpose of the OSH Act. Contrary to the view of the Fifth Circuit, Section 4(b)(1) does not create industry-wide exemptions from the OSH Act based on limited exercises of regulatory authority by other federal agencies. Rather, the OSH Act is displaced when another agency actually has regulated the working conditions at issue or has articulated a policy that the working conditions should not be regulated. See, *e.g.*, *Norfolk Dredging*, 783 F.2d at 1530.[5] Because

[5] Such displacement can occur with regard to either a specific working condition or a set of working conditions with respect to which an agency has comprehensive statutory authority and has indicated that its exercise of that authority is sufficient. Thus, as explained in the MOU between the Coast Guard and OSHA, the Coast Guard's exercise of its authority with respect to inspected vessels has displaced OSH Act coverage because the Coast Guard has promulgated "extensive specific regulations governing the working conditions of seamen aboard inspected vessels as well as ample general authority regulations to cover these seamen with respect to all other working conditions that are not addressed by the specific regulations." App., *infra*, 63a.



the Coast Guard has neither regulated the working conditions at issue here nor articulated a policy that they should not be regulated, the OSH Act continues to apply.

a. Section 4(b)(1) of the OSH Act provides that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). As all the courts of appeals (including the Fifth Circuit) agree, that language expressly provides that OSH Act coverage is displaced only when another agency actually has "exercise[d]" its statutory authority to regulate occupational safety and health.[6] Possession of statutory authority is necessary but not sufficient to oust OSHA jurisdiction. The other agency must also "exercise" that authority by prescribing or enforcing regulations or by articulating a policy that regulation is not warranted. See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *Norfolk Dredging*, 783 F.2d at 1530; *Southern Pac. Transp. Co.*

[6] See App., *infra*, 6a; *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *Norfolk Dredging*, 783 F.2d at 1530; *Red Star*, 739 F.2d at 778; *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 915 (3d Cir. 1980); *Southern Ry.*, 539 F.2d at 336-337; *Southern Pac.*, 539 F.2d at 389.

v. *Usery*, 539 F.2d 386, 391-392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).[7]

The text of Section 4(b)(1) also makes clear that a federal agency's exercise of authority to regulate some working conditions of some employees within an industry does not create an industry-wide exemption from OSH Act coverage. See *Tidewater Pac.*, 160 F.3d at 1245; *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778; *Baltimore & Ohio R.R.*, 548 F.2d at 1053-1054; *Southern Ry.*, 539 F.2d at 338; see also *Southern Pac.*, 539 F.2d at 389-390. By its terms, the text limits preemption to "*working conditions* of employees with respect to *which*" other federal agencies exercise authority. 29 U.S.C. 653(b)(1) (emphasis added). If Congress had intended to create industry-wide exceptions to OSH Act coverage, Congress could have provided that the Act would not apply to "industries in which" other agencies regulate occupational

[7] The legislative history is equally clear on this point. Several bills under consideration would have precluded OSH Act enforcement whenever another agency "has" statutory authority. See S. 2788, 91st Cong., 1st Sess. § 15, at 32 (1969); H.R. 843, 91st Cong., 1st Sess. § 13, at 22 (1969); H.R. 4294, 91st Cong., 1st Sess. § 13, at 13 (1969); H.R. 13373, 91st Cong., 1st Sess. § 15, at 32 (1969), *reprinted in* Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 62, 620, 671, 710 (Comm. Print 1971) (*Leg. Hist.*). The versions reported in both the House and Senate, see S. 2193, 91st Cong., 2d Sess. (1970), as reported, § 4(b)(1) (*Leg. Hist.* 237); H.R. 16785, 91st Cong., 2d Sess. (1970), as reported, § 22(b) (*Leg. Hist.* 975), as well as the text that was ultimately enacted, however, precluded OSH Act enforcement only when another agency "exercises" such authority. That point was also emphasized in a colloquy on the House floor. See *Southern Ry.*, 539 F.2d at 337 (quoting *Leg. Hist.* 1019); 116 Cong. Rec. 38,381 (1970).



safety and health. Or Congress could have displaced OSH Act coverage of "working conditions of employees with respect to *whom*" other agencies exercise such authority. But Congress chose not to do so.

The bill initially passed by the House of Representatives did in fact provide for preemption of "working conditions of employees with respect to whom" other agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. See H.R. 16785, 91st Cong., 2d Sess. § 25(b) (1970), *reprinted in* Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 1109 (Comm. Print 1971) (*Leg. Hist.*). Congress, however, did not adopt the language in the House bill; instead Congress chose the language in the Senate bill, which used "which" instead of "whom." See S. 2193, 91st Cong., 2d Sess. § 4(b)(1), at 5 (1970) (*Leg. Hist.* 533). As the Senate Report explained, that language limited preemption to "*particular* working conditions regarding which another Federal agency exercises statutory authority." S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis added) (*Leg. Hist.* 162). The Conference Committee recognized the difference in the language between the House and Senate versions and chose the Senate language. See H.R. Conf. Rep. No. 1765, 91st Cong., 2d Sess. 32-33 (1970) (*Leg. Hist.* 1185-1186). Thus, "consideration of the way in which Congress arrived at the statutory language," *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198 (1974), confirms that exemptions from OSH Act coverage under Section 4(b)(1) depend on whether another federal agency has exercised statutory authority with respect to the "particular working conditions" at issue. S. Rep. No. 1282, *supra*, at 22.

That understanding of Section 4(b)(1) is also reflected in long-standing OSHA regulations. See 29 C.F.R. 1975.1(b) (because the Act is "inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions," "standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority"); 29 C.F.R. 1975.3(c) ("Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection."). The Secretary of Labor also set forth that interpretation of the Act in 1980 in a report to Congress concerning coordination between the OSH Act and other federal laws. App., *infra*, 56a, 57a ("industries as such are not preempted from OSHA; rather, the preemption rule of section 4(b)(1) applies only to particular hazards"). And that interpretation is reflected in three decades of citations for OSH Act violations that have been issued to employers operating in industries regulated in part by other federal agencies, as illustrated by the court of appeals decisions discussed above (see pp. 13-14, *supra*). See *Martin* v. *OSHRC*, 499 U.S. 144, 156-157 (1991) (courts must defer to reasonable regulatory interpretations embodied in OSHA citations).

To reject that long-standing interpretation and instead to read Section 4(b)(1) as creating industry-wide exemptions from OSH Act coverage based on limited exercises of regulatory authority by other federal agencies not only is inconsistent with the statutory language and drafting history but also would undermine



the express purpose of the Act. As Congress explained in the text of the Act itself, the Act's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). That purpose would be frustrated if another federal agency's limited regulation of a few working conditions of some employees in a particular industry displaced OSH Act coverage over all working conditions of all employees in that industry. See *Red Star*, 739 F.2d at 780; *Baltimore & Ohio R.R.*, 548 F.2d at 1054; *Southern Ry.*, 539 F.2d at 338.

b. The court of appeals therefore erred in holding that there is "an industry-wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters," App., *infra*, 6a, including seamen serving on uninspected vessels, based on the Coast Guard's regulation of some of their working conditions on certain vessels. Instead, as we have explained, the proper inquiry under Section 4(b)(1) is whether the Coast Guard has regulated the particular working conditions with respect to which OSHA seeks to enforce its own safety or health standards or has articulated a policy that the working conditions not be regulated.

If the court of appeals had conducted that inquiry in this case, it would have concluded that Coast Guard action has not displaced the OSH Act. The Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard *inspected* vessels, and its comprehensive regulation of those working conditions has displaced OSH Act coverage of the working conditions of seamen on those vessels. See p. 4 & note 5, *supra*; App., *infra*., 63a. But the vessel at issue in this case is an *uninspected* vessel. See *id.* at 6a, 27a. The Coast Guard has authority to

regulate and has regulated only a few working conditions on uninspected vessels. See pp. 4-5, *supra* (discussing 46 U.S.C. 4102 (1994 & Supp. IV 1998) and 46 C.F.R. Pts. 24-26); note 8, *infra*. In addition, the Coast Guard has not articulated, and has no statutory authority to articulate, a policy that other working conditions on uninspected vessels should be free from regulation.

The working conditions at issue in this case are the conditions faced by employees on an uninspected vessel engaged in inland oil drilling operations—in particular, the risk of explosion caused by the presence of natural gas.[8] Because the Coast Guard has not regulated (and

[8] Although the OSH Act does not define "working conditions," the Secretary has long taken the view that the term means particular hazards encountered by an employee in the course of his or her job activities. See, *e.g.*, *Southern Ry.*, 539 F.2d at 339 (describing Secretary's interpretation); App., *infra*, 56a, 57a (equating working conditions as used in Section 4(b)(1) with "particular hazards"). See also *Corning Glass Works*, 417 U.S. at 201-202 (technical meaning of "working conditions" in the language of industrial relations is a worker's "surroundings"—"the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency"—and "hazards"—"physical hazards regularly encountered, their frequency, and the severity of injury they can cause"). Although some courts of appeals have adopted that definition of "working conditions," see *Red Star*, 739 F.2d at 778-780 (2d Cir.); *Norfolk Dredging*, 783 F.2d at 1530-1531 (11th Cir.); *PBR, Inc.*, 643 F.2d at 896 (1st Cir.), others have defined "working conditions" somewhat more broadly as "the environmental area in which an employee customarily goes about his daily tasks," *Southern Ry.*, 539 F.2d at 339 (4th Cir.); *Columbia Gas*, 636 F.2d at 916 (3d Cir.).

Resolution of that disagreement is not, however, necessary to resolve the issue presented in this case. The Coast Guard neither regulates the particular hazard of explosion caused by the presence of natural gas on an uninspected drilling rig nor otherwise



indeed could not regulate) those working conditions, it has not exercised any authority so as to displace OSH Act coverage of them. The court of appeals erred in concluding to the contrary.

3. This Court should correct the erroneous decision of the court of appeals not only because that decision has created a conflict among the federal courts of appeals (see pp. 9-12, *supra*), but also because it puts at risk the safety and health of employees on thousands of uninspected vessels within the jurisdiction of the Fifth Circuit. According to data maintained by the Coast Guard, approximately 68,000 vessels nationwide—including barges, fishing vessels, tugboats, towing vessels, and other commercial vessels—are classified as "documented" but not "inspected."[9] Those vessels are

regulates uninspected drilling barges so pervasively as to oust OSHA from enforcing its regulations in the affected "environmental area" on the vessel. As we have explained at pp. 4-5, *supra*, the Coast Guard's statutory authority to regulate uninspected vessels is limited to specific subjects, including fire extinguishers, life preservers, flame arrestors or backfire traps, ventilation, and emergency locating equipment. 46 U.S.C. 4102 (1994 & Supp. IV 1998). As a result, Coast Guard regulations for uninspected vessels cover only a very limited range of health and safety hazards and do not address any hazards relating to oil drilling operations. See 46 C.F.R. Pts. 24-26. Thus, even under "the Third and Fourth Circuits' environmental definition, it is apparent that the Coast Guard regulation of uninspected vessels is not so pervasive as to preempt the Secretary's jurisdiction as to any particular portion of such vessels nor as to such vessels in whole." *Tidewater Pac.*, 160 F.3d at 1245-1246.

[9] To be eligible for documentation, a vessel must be at least five net tons and meet certain other statutory requirements. See 46 U.S.C. 2101(10) (definition); 12102 (1994 & Supp. IV 1998) (requirements). To be subject to inspection, a vessel must fall into one of the categories listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998). Some vessels, such as fishing vessels smaller than five net tons, are

now subject to OSHA regulation everywhere except within the Fifth Circuit. Although the Coast Guard does not maintain data on a State-by-State basis, OSHA and the Coast Guard estimate that the decision below will leave the crews of several thousand uninspected vessels in the Fifth Circuit with no statutory protection from serious threats to their occupational safety and health, except for a few Coast Guard rules directed to a narrow range of hazards on only some vessels. According to Coast Guard marine casualty reporting records, an average of 100 deaths and 600 injuries occur every year on uninspected vessels nationwide, including more than two dozen deaths and 100 injuries each year within the Fifth Circuit.[10] In addition, if the Fifth Circuit were to extend the rationale of its decision to permit industry-wide exemptions in other fields, its decision could affect employees in many other large industries, such as railroad and airline employees.

Permitting the court of appeals' decision to stand would also interfere with long-standing, settled decisions regarding the lawful and most effective division of

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neither inspected nor documented by the Coast Guard. As a result, the Coast Guard data understate the number of uninspected vessels.

[10] The Coast Guard defines a reportable injury as one "that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties." 46 C.F.R. 4.05-1(a)(6). The numbers included in the text are based on Coast Guard records for fiscal years 1996 through 2000. Not all marine casualties occur in circumstances that would potentially subject the vessel to OSH Act coverage. For example, if an accident occurs while a vessel is on the high seas, it is generally beyond the geographical scope of the OSH Act. See 29 U.S.C. 653(a).



safety and health regulatory responsibilities between the Departments of Transportation and Labor. With the consent and active cooperation of the Coast Guard, OSHA historically has enforced the OSH Act nationwide with respect to working conditions of employees on uninspected vessels (except in the rare case in which the Coast Guard has a regulation applicable to uninspected vessels that addresses the same occupational safety or health hazard). OSHA inspects such vessels in response to employee complaints, fatalities, and referrals, and OSHA inspectors often accompany Coast Guard personnel responding to marine casualties. Because the Coast Guard lacks statutory authority to promulgate and enforce general occupational safety and health standards for uninspected vessels, the Fifth Circuit's decision will leave thousands of employees unprotected from risks of death and serious injury, many of which (like the well blowout in this case) are not even specifically maritime in nature.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2000

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 99-60124

MALLARD BAY DRILLING, INC., PETITIONER

*v.*

ALEXIS HERMAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

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June 2, 2000

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Before: POLITZ and DAVIS, Circuit Judges, and RESTANI,* Judge.

W. EUGENE DAVIS, Circuit Judge:

Mallard Bay Drilling, Inc. ("Mallard") appeals the order of the Occupational Safety and Health Review Commission affirming a citation issued against it by the Occupational Safety and Health Administration ("OSHA"). The order affirmed the decision of the Administrative Law Judge, which found that Mallard's drilling barge—the MR. BELDON—was a "workplace" within the meaning of the Occupational Safety and

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* Judge of the U.S. Court of International Trade, sitting by designation.

Health Act ("OSH Act")[1] and that OSHA's jurisdiction was not preempted by the Coast Guard's regulatory authority over vessels. For the reasons that follow, we reverse.

## I.

On June 16, 1997, four Mallard employees were killed and two others seriously injured in an explosion on the MR. BELDON, a Mallard drilling barge. On that date, the MR. BELDON was drilling an oil well on Little Bayou Pigeon, a navigable waterway within the territorial waters of Louisiana. The explosion occurred while crew members tried to regain control of the well after a blow out. The Coast Guard took the lead role in investigating the explosion. Based on the information collected by the Coast Guard, OSHA issued a citation against Mallard charging three violations of the OSH Act. Mallard did not challenge the merits of the allegations; rather, it asserted that OSHA lacked authority to regulate working conditions aboard the MR. BELDON. It also argued that the MR. BELDON was not a "workplace" within the meaning of Section 4(a) of the OSH Act.[2]

The ALJ affirmed the citation, finding that the MR. BELDON was a "workplace," that Mallard's employees were not seamen, and that OSHA's jurisdiction was not preempted by the Coast Guard's regulatory authority over vessels. Mallard then filed a Petition for Discretionary Review with the Occupational Safety and Health Review Commission, which was denied. Mallard now appeals.

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[1] 29 U.S.C. § 651 *et seq.*

[2] 29 U.S.C. § 653(a).



## II.

Mallard contends that the United States Coast Guard has exclusive jurisdiction over the regulation of working conditions of seamen aboard vessels such as the MR. BELDON, thus precluding OSHA's regulation under Section 4(b)(1) of the OSH Act.[3] As our discussion below demonstrates, precedents from this Court compel us to agree.

By its own terms, the OSH Act does not apply to "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."[4] Under 14 U.S.C. § 2, the Coast Guard "shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. . . ."

It is uncontested that the Coast Guard had jurisdiction to investigate the marine casualty in this case, pursuant to 46 U.S.C. § 6301. The dispute concerns whether the Coast Guard's jurisdiction is exclusive. Our case law is controlling on this point. Pursuant to the statutory grant of authority recited above, the Coast Guard has exclusive authority over the working conditions of seamen. *See Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). "OSHA regulations do not apply to *working conditions*

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[3] 29 U.S.C. § 653(b)(1).

[4] 29 U.S.C. § 653(b)(1).

of *seamen* on *vessels* in navigation." *Donovan*, 720 F.2d at 826, 827 (emphasis added); *see also Clary*, 609 F.2d at 1121.

As in *Clary*, the "vessel" in this case is a drilling barge. The employees working on the MR. BELDON are "seamen" under our case law. *See Colomb v. Texaco, Inc.*, 736 F.2d 218 (5th Cir. 1984); *Producers Drilling Co. v. Gray*, 361 F.2d 432 (5th Cir. 1966). The safety procedures at issue in this case relate to "working conditions" of seamen.

In *Clary*, the plaintiff seaman brought suit for injuries sustained aboard a drilling barge on which he was working. 609 F.2d at 1121. He alleged that OSHA regulations were violated because the steel plate welded to the deck (which he tripped over) was not color coded yellow so as to make it more visible. *Id.* This Court ruled that the district court was correct in refusing to allow the plaintiff to introduce the OSHA regulations into evidence because "OSHA regulations . . . do not apply to working conditions of seamen on vessels in navigation. . . ." *Id.* at 1122. We reasoned that the Coast Guard was the federal agency with statutory authority over the working conditions of seamen, and that its regulations included standards governing the safety and health of persons working on vessels. *Id.* Because *Clary* is indistinguishable from the case at bar, its holding controls our decision.

Respondent attempts to distinguish *Clary* by arguing that this Court, in ruling that OSHA lacked authority to regulate the working conditions of seamen, did not specifically consider whether its holding applied equally to uninspected and inspected vessels. Thus, respondent argues that *Clary* does not bind our



decision as to the uninspected vessel at issue in today's case.

The vessel in *Clary* was a drilling barge—the same type of vessel at issue in this case—and there is no indication from *Clary* that the barge in that case was inspected. Further, the broad language of *Clary* does not turn on any such distinction. [5]

Furthermore, the Coast Guard is no stranger to uninspected vessels. It is expressly authorized to issue safety regulations for uninspected vessels for: (1) the number, type and size of fire extinguishers; (2) the type and number of life preservers; (3) flame arrestors, backfire traps; (4) ventilation of engine and fuel tank compartments; and (5) the number and types of alerting and locating equipment for vessels on the high seas. 46 U.S.C. § 4102. Further, the Coast Guard has issued a number of safety regulations for uninspected vessels, including those related to: life preservers and other lifesaving equipment; emergency alerting and locating equipment; fire extinguishing equipment; backfire flame control; ventilation of tanks and engine spaces; cooking, heating, and lighting systems; safety orientation and emergency instructions; action required after an accident; and signaling lights. *See* 46 C.F.R. §§ 25.01 *et seq*; 46 C.F.R. §§ 26.01 *et seq.* Thus, the Coast Guard has authority to issue safety regulations for uninspected vessels, as well as inspected vessels, and it has

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[5] The additional finding in *Clary* that the OSHA regulations cited by the plaintiff did not apply to a special purpose vessel does not supplant *Clary's* holding that the OSH Act "does not apply to the working conditions of seamen on vessels operating on the high seas," which *Clary* described as the "one significant decision" made therein. 609 F.2d at 1121, 1122.

in fact exercised this authority.[6] The fact that the MR. BELDON is an uninspected vessel is therefore no basis upon which to distinguish *Clary*.

In *Donovan*, this Court revisited the applicability of OSHA regulations to the working conditions of seamen. 720 F.2d 825. Although *Donovan's* facts are distinguishable from the facts of this case, we made it perfectly clear that we were reaffirming the principles we laid down in *Clary*. We stated that "[i]t is the law of this circuit that OSHA regulations do not apply to working conditions of seamen on vessels in navigation. . . ." *Id.* at 826. "Nothing in OSHA shall apply to working conditions of seamen on vessels." *Id.* at 827. "[T]he Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry-wide exemption [from OSHA] for seamen serving on vessels operating on navigable waters." *Id.* at 826.

We gave a number of reasons in *Donovan* for our conclusion that the Coast Guard's jurisdiction is exclusive in this area

> "Section 4(b)(1) evidences a general Congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation,

[6] Because a drilling barge is not self-propelled, some of these regulations, by their nature, do not apply to the MR. BELDON. However, this does not change the fact that the Coast Guard has exercised its authority to issue safety regulations for uninspected, as well as inspected, vessels.



> and stultification of enterprise." *Donovan*, 720 F.2d at 827.
>
> We explained that overlapping regulation "might well produce [the] . . . anomaly . . . of steaming in and out of OSHA coverage." *Donovan*, 720 F.2d at 829.
>
> "[A] single, uniform set of rules should govern the maritime workplace. Because of OSHA's geographic limitations . . . this cannot be those of OSHA . . . . [thus] we conclude that it must be those of the Coast Guard." *Donovan*, 720 F.2d at 829.

Because OSHA has no jurisdiction in this matter, we need not address Mallard's contention that the MR. BELDON was not a "workplace" within the meaning of Section 4(a) of the OSH Act.[7]

## III.

For the reasons stated above, we hold that OSHA lacked authority to regulate the working conditions of the employees aboard the MR. BELDON; rather, such authority rests solely with the United States Coast Guard. Our precedents are clear on this point and admit of no exception for this case. Thus, the citation OSHA issued against Mallard is VACATED, and the order of the Occupational Safety and Health Review Commission is REVERSED and judgment is RENDERED in favor of Mallard.

[7] Under Section 4(a), the OSH Act applies "with respect to employment performed in a workplace in a State." 29 U.S.C. § 653(a).

**APPENDIX B**

[Seal Omitted]

United States of America
**OCCUPATIONAL SAFETY AND HEALTH**
**REVIEW COMMISSION**
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Phone: (404) 562-1640 Fax: (404) 562-1650

OSHRC Docket No. 97-1973

SECRETARY OF LABOR, COMPLAINANT

v.

MALLARD BAY DRILLING, INC., RESPONDENT

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**APPEARANCES**

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Dallas, Texas
For Complainant

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Jones, Walker, Waechter, Poitevent,
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For Respondent

Before: Administrative Law Judge Ken S. Welsch



**DECISION AND ORDER**

Mallard Bay Drilling, Inc.[1] (MBD), owns and operates drilling rigs and barges for oil and gas exploration from its place of business in New Iberia, Louisiana (Joint Exh. J-1). On June 16, 1997, a natural gas explosion occurred on Rig 52 (MR. BELDON), which resulted in death and serious injuries to employees and the total loss of the rig. The U.S. Coast Guard initiated an investigation on June 17, 1997. Also, at the same time, the Occupational Safety and Health Administration (OSHA) initiated its investigation.

As a result of the OSHA investigation, MBD received a serious citation alleging violations of § 5(a)(1) of the Occupational Safety and Health Act (Act) for failing to timely evacuate employees on board the drilling rig; 29 C.F.R. § 1910.120(q)(1) for failing to develop and implement an emergency response plan to handle anticipated emergencies; and 29 C.F.R. § 1910.120(q)(6) for failing to train employees in emergency response. OSHA proposed a penalty of $6,300 for each alleged violation.

The hearing was held on April 27, 1998, in New Orleans, Louisiana. MBD stipulated that it is an employer engaged in a business affecting commerce within the meaning of the Act (Tr. 7). MBD also agrees that if OSHA's jurisdiction is not preempted by the U.S. Coast Guard, MBD withdraws its contest to the alleged violations of § 5(a)(1) of the Act and 29 C.F.R. §§ 1910.120(q)(1) and 1910.120(q)(6) (Tr. 5-6). In exchange, the Secretary amends the proposed penalties to $4,410 for each violation (Tr. 4).

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[1] Subsequent to issuance of the citation, MBD changed its name to Mallard Bay Drilling, LLC (Tr. 120).

MBD argues that OSHA lacks jurisdiction or its jurisdiction is preempted by the U.S. Coast Guard. Based on Review Commission precedent, OSHA's jurisdiction is not preempted.

*Background*

MBD is engaged in oil and gas drilling explorations in the United States, Africa and the Far East. In business since 1952, MBD's principal place of business is in New Iberia, Louisiana (Joint Exh. J-l; Tr. 122). MBD owns and operates 170 marine units, including drilling barges, such as Rig 52, crew boats and various deck barges (Tr. 96). It employs approximately 1,200 employees worldwide (Tr. 121). MBD's business primarily involves a "work-over" operation, which is work done on a preexisting well to enhance its production capabilities (Tr. 104).

MBD's Rig 52, known as MR. BELDON, was a special purpose barge; one of ten classified deep drilling barges owned by MBD in the United States (Tr. 112). It was a non-self propelled barge which was moved to location by a tug boat (Tr. 121). The stern of the barge had a "key" slot to allow the barge to position the stem-mounted derrick directly over the well. Rig 52 had three decks. The lower deck was designed to allow it to be completely submerged while on location. The second deck was mostly enclosed with steel bulkheads and accommodated generators, mud tanks, mixing vats, mud pumps, parts storage space and the control room. The upper deck of the barge consisted of a large, completely enclosed house (forward) which was the living quarters, galley and office (Joint Exh. J-1; Exhs. C-4, C-5).



Rig 52 was constructed in 1981. Construction plans were reviewed by the American Bureau of Shipping (ABS) (Exh. R-6; Tr. 19). Since initial construction, the rig has neither been classed nor reinspected by ABS. Rig 52 also received a Certificate of Documentation from the U.S. Coast Guard (Exh. R-6). The Coast Guard considered it an uninspected vessel which did not hold a U.S. Coast Guard issued certificate of inspection nor was it required to be inspected by the Coast Guard (Exh. C-1; Tr. 28, 113, 122). *Also see* definition at 46 U.S.C. § 2101(43).

On June 16, 1997, Rig 52 was operating in the Little Bayou Pigeon, a navigable body of water in the territorial waters of Louisiana. It was located approximately 30 miles northwest of Morgan City, Louisiana (Tr. 27). Rig 52 was in the final stages of well completion, pursuant to a drilling contract with Denbury Management, Inc., owner of the well (Joint Exh. J-l, Exh. C-1). The rig had been at the location for approximately 70 days, and the well was at a depth of 13,500 feet (Tr. 121). There were 22 employees on the rig (Tr. 33).

During the final stages, Rig 52 was performing an operation called "reversing out," which is the circulation and displacement of heavy drilling mud from the well. A calcium chloride solution is pumped into the well which displaces the mud. The mud is deposited in a shale shaker on the rig and pumped to an open hopper barge (Joint Exh. J-1). While reversing out, there were a blowout and an explosion which occurred at approximately 9:00 p.m. (Exh. C-1; Tr. 33, 65). The explosion killed and injured several employees.

The U.S. Coast Guard initiated its investigation on June 17, 1997 (Tr. 25). The U.S. Coast Guard estab-

lished a command post, inspected the site and interviewed employees. The scope of the investigation was limited to vessel issues, including hazard recognition, written procedures, engineering, and overall crew competency (Tr. 26-27). As a result of its investigation, the Coast Guard made general recommendations, but no finding of violation by MBD (Exh. C-1).

The OSHA investigation was conducted by compliance officer Michael Sophrer and was limited to the emergency response requirements of § 1920.120. Other than obtaining documents furnished to the U.S. Coast Guard, OSHA did not inspect the barge or interview employees (Tr. 67-68).

*Discussion*

OSHA has jurisdiction under § 4(a) of the Act.

Section 4(a) of the Act provides in part that:

> This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Act, Johnson Island, and the Canal Zone.

MBD argues that the Act's jurisdiction does not extend to a vessel such as Rig 52 because it is not a "work place" as required by the Act. MBD cites *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983). The *Texaco* case involved a Coast Guard licensed engineer employed on Texaco's deep sea fleet who complained of discrimination under § 11(c) of the Act. The Fifth Circuit concluded that the Act's regulations do not apply to working conditions of seamen on vessels in navigation.



MBD's employees were not licensed nor had certificates from the U.S. Coast Guard (Tr. 108-109). The employees were not seamen as defined by the U.S. Coast Guard (Tr. 29-30). The employees were not performing navigational-related activities (Tr. 32). Rig 52 was considered by the Coast Guard as an uninspected vessel, although it was documented and had an official number (Tr. 28, 43). It was stationary and within the territorial boundaries of the State of Louisiana (Tr. 30). To move from location to location, the rig needed to be towed by a tug boat (Tr. 43).

In considering the application of § 4(a) of the Act, the Review Commission concluded that "OSHA has authority to enforce the OSH Act with respect to vessels that are located in U.S. territorial waters." *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997). Rig 52 was a vessel within the territorial boundaries of Louisiana. It was a workplace.

Section 4(a) of the Act is applicable.

Application of § 4(b)(1) Preemption.

Section 4(b)(1) provides that:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory

> authority to prescribe or enforce standards or regulations affecting occupational safety and health.

The U.S. Coast Guard conducted its investigation under the authority of 46 C.F.R., Part 4, as derived from 46 U.S.C. § 6301. The Coast Guard determined that the Rig 52 accident met the definition of a marine casualty or accident. *See* 46 C.F.R. § 4.03-1. The rig was a vessel in commercial service operating upon the navigable waters of the United States. (Joint Exh. J-1). It was designated by the Coast Guard as a serious marine incident because it involved one or more dealths, multiple injuries requiring medical attention, and there was damage to property in excess of $100,000 (Exh. C-1; Tr. 26).

> To prove the affirmative defense that OSHA's jurisdiction has been preempted under section 4(b)(1), the employer must show that (1) the other federal agency has the statutory authority to regulate the cited working conditions, and (2) that agency has exercised that authority by issuing regulations having the force and effect of law.

*Rockwell International Corp.*, 17 BNA OSHC 1810, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996).

Where the employer claiming the exemption satisfies its burden of proving that another agency has exercised its authority, OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-1704 (No. 89-1192, 1992). The term "exercise," as used in § 4(b)(1), requires an actual assertion of regulatory authority as opposed to a mere



possession of authority. OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Id.* at 1703-1704.

In the *Alaska Trawl* case, the Commission found that, in the absence of relevant Coast Guard regulations, OSHA jurisdiction over work performed on uninspected vessels was not preempted. There was no industry-wide exemption from OSHA regulations. The Commission dismissed as dictum the implication that *Dillingham Tug & Barge Corp.*, 10 BNA OSHC 1859 (No. 77-4143, 1982), created an industry-wide exemption. *Id.* at 1704-1705. Absent an industry wide exemption, OSHA jurisdiction is preempted only if the Coast Guard has specifically regulated the cited condition.

Emergency Response

The OSHA citation alleges that MBD failed to evacuate employees and failed to have an emergency response plan. MBD does not argue or identify any similar requirement enforced by the U.S. Coast Guard.

In *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1924 (No. 93-2529, 1997), the Review Commission found that the Coast Guard only regulates uninspected vessels to a "minimum" degree. The Coast Guard filed an amicus brief in the *Tidewater* case disclaiming comprehensive regulation of uninspected vessels. The Coast Guard described its safety standards applicable to uninspected vessels as solely limited to those areas delineated in 46 U.S.C. Chapter 41, which regulates the (a) number, type and size of fire extinguishers; (b) type and number of life preservers; (c) flame arresters, backfire traps, or similar devices on vessels with gasoline engines; (d) ventilation of engine and fuel tank compartments; and

the (e) number and types of alerting and locating equipment for vessels on the high seas. *Id.* at 1924.

Chief Warrant Officer John Grez of the U.S. Coast Guard, Marine Safety Office, who conducted the investigation into the Rig 52 explosion, testified that the scope of his investigation was limited to issues of hazard recognition, written procedures, engineering and overall crew competency (Tr. 26-27). He agreed that the Coast Guard regulations for uninspected vessels did not address the same concerns regarding employees evacuation and emergency response as cited by OSHA (Tr. 35).

MBD argues the Fifth Circuit case law concludes that Coast Guard statutory authority preempts OSHA. *See Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1150 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). Generally, these cases hold that OSHA regulations do not apply to the working conditions of employees on vessels in navigation.

However, the Review Commission in *Tidewater* analyzed the same Fifth Circuit case law relied upon by MBD. As stated in *Tidewater*:

> Nevertheless, with due respect to the court, we find that *Clary* and *Donovan v. Texaco* are sufficiently distinguishable from the case here presented to have left undecided the precise question of OSH Act applicability to uninspected vessels.
>
> In neither of the cases considered by the court did it differentiate between the extensive degree to which the Coast Guard regulates inspected vessels and the minimal degree to which it regulates those



> that are uninspected. The vessel classifications in those cases were not identified, although the court's consideration in *Donovan v. Texaco* of the MOU between the Coast Guard and OSHA suggests that the vessel there was inspected. 720 F.2d at 827 n.3. Moreover, the court relied in both cases on Commission precedent, subsequently overruled, suggesting that OSHA lacks jurisdiction over the working conditions of seamen. Most significantly in *Clary*, the court found that the cited OSHA construction and shipbuilding regulations did not, by their own terms, pertain to the special purpose drilling vessel on which the injured seaman worked. 609 F.2d at 1122. This fact alone would have been sufficient to decide the case. . . . Similarly, the court's finding in *Donovan v. Texaco*, that the Coast Guard's regulations included protections "parallel" to those contained in section 11(c), would have been sufficient to dismiss the Secretary's case.
>
> Inspected vessels subject to the MOU between OSHA and the Coast Guard are essentially regulated only by the Coast Guard and, consequently, would not steam in and out of OSHA coverage. As to the uninspected fleet, OSHA provides the only significant regulation of non-navigational working conditions for seamen employed on these vessels. Absent OSH Act coverage, these conditions would be completely unregulated.

*Id.* at 1927.

Also, MBD cites *Perry v. Falcon Drilling Company, Inc.*, 1995 WL 273538 (E.D. La., 1995) which held that OSHA regulations on stairs and stairways did not apply

to FALCON Rig 16, an uninspected vessel, because of the U.S. Coast Guard's statutory authority. However, the decision in *Perry* is distinguishable from this case. The District Court found that the Coast Guard's regulations applicable for stairs and stairways precluded application of the OSHA regulations. The court stated that "OSHA regulations simply should not apply to govern safety concerns on vessels which have unique problems and concerns best addressed by the Coast Guard." In this case, there is no showing that the Coast Guard exercises authority to regulate employee evacuations and emergency response to hazardous substance releases during an explosion of a drilling rig.

Therefore, pursuant to commission precedent, OSHA jurisdiction in this case is not preempted by the U.S. Coast Guard.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Serious Citation No. 1

1. Item 1, serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of $4,410 is assessed.

2. Item 2, serious violation of § 1910.120(q)(1), is affirmed and a penalty of $4,410 is assessed.



3. Item 3, serious violation of § 1910.120(q)(6), is affirmed and a penalty of $4,410 is assessed.

/s/ KEN S. WELSCH
KEN S. WELSCH
Judge

**APPENDIX C**

[Seal Omitted]

United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of Executive Secretary
Phone: (202) 606-5400
Fax: (202) 606-5050

OSHRC Docket No. 97-1973

SECRETARY OF LABOR, COMPLAINANT

v.

MALLARD BAY DRILLING, INC., RESPONDENT

---

**NOTICE OF FINAL ORDER**

The petition for discretionary review filed by the Respondent in the above cited action was received by the Commission on December 17, 1998. The case was not directed for review. Therefore, the decision of the Administrative Law Judge became a final order of the Commission on December 28, 1998. Commission Rule 90(d), 29 C.F.R. § 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

**ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN**



**60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Dated: January 6, 1999 /s/ RAY H. DARLING, JR.
RAY H. DARLING, JR.
Executive Secretary

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**APPENDIX D**

MARINE CASUALTY NARRATIVE SUPPLEMENT

MCNS 06JAN98

CASE/MC97008193
PORT/ MORMS
SUBJECT/MALLARD RIG 52
DATE/ 17 JUN 97

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(3) Francison Nunez
(4) Mike McCarthy



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— COMMENTS —

EXECUTIVE SUMMARY: On June 16, 1997, the Mallard Rig 52 was in the final stages of completing an oil & natural gas well in the Atchafalaya Basin, St. Martin Parish, Louisiana. During the completion operation, the well kicked, and control of the well was lost. The installed well shutdown system then failed. The off duty crew of the rig was evacuated to an standby tug, and the on duty crew stayed in the rig to attempt well kill operations. Approximately 35 min. after loosing control of the well, a natural gas explosion swept

through the rig. The explosion resulted in the deaths of four rig workers on the second deck of the rig, and the injury of one rig worker on an adjacent work boat. A second rig worker was injured while evacuating from the rig after the explosion. As a result of the explosion and accompanying fire, the rig was declared a total constructive loss.

AUTHORITY: This investigation has been conducted under the Authority of 46 C.F.R. Part 4 as derived from authority contained in 46 U.S.C. 6301. This particular incident meets the definition of a Marine Casualty or Accident from 46 C.F.R. 4.03-1 in that the MALLARD RIG 52 was a vessel in commercial service operating upon the Navigable Waters of the United States. Furthermore, this Marine Casualty meets three of the five conditions for designation as a Serious Marine Incident in 46 C.F.R. 4.03-2 in that; One or more deaths did occur; multiple injuries requiring medical attention did occur; damage to property was in excess of $100,000.00. This Marine Casualty also meets the definition of a Major Marine Casualty contained in COMDTINST 16000.10, Coast Guard Marine Safety Manual Vol. V, Investigations, Chapter 3 in that property damage was initially estimated at more than $500,000.00.

SCOPE: Coast Guard D8m decided to limit the scope of the investigation to purely vessel issues. This investigation does not examine the production related equipment including the drill string, its attachments or subsurface equipment based on the scope as directed by D8m. The Coast Guard does not regulate mineral drilling operations in state waters, and does not have the expertise to adequately analyze all issues relating to the failure of an oil/natural gas well. This report acts



to record the explosion and its resulting damage, and the issues of hazard recognition, written procedures, engineering, and overall crew competency.

PREAMBLE: On 16 June, 1997, the MALLARD RIG 52 was operating on location in Bayou Pigeon, Lake Chicot Oil and Gas Field, on an oil and natural gas well owned by Denbury Management, Inc. The rig had finished drilling Denbury's well at that location approximately two weeks prior, and was in the final stages of the well completion operation. The operation being performed, called "reversing out", was the circulation and displacement of heavy drilling mud (17.5 lb./gal) from the well bore (annulus). This was done by pumping a calcium chloride solution into the well annulus which displaced drilling mud from well through a five (5) inch drill pipe tool string. The mud was then deposited in a shale shaker on the rig and pumped to a open hopper (shale) barge moored along side of the rig. The term reversing out is used because normally, fluids are pumped through the tool string to accommodate 24 hour operations on the rig. The night crew was up and working. The day crew was in the crew quarters sleeping.

EQUIPMENT:

(1) WELL EQUIPMENT IN USE:

a. Outside preventors: The annular blow out preventor stack (BOP) consisted of: (from top down) (See PHOTO # 1 & 2)

1) Annular preventor (hydrill rubber)
2) 5" Pipe ram
3) Blind Ram
4) 5" pipe Ram

b. The tool string (inside preventor) consisted of two (2) Texas Iron Works (TIW) in line ball valves. TIW valves are designed and marketed as a fail safe high pressure emergency shut down in-line valve. The advantage to a TIW valve is that it has a diameter similar to that of the tool string to which it is attached, allowing it to be lowered into the well with the tool string.

(2) MALLARD RIG 52 DESCRIPTION: The MALLARD RIG 52 is a 190' X 50' X 12" posted drilling barge with three separate deck levels, see PHOTO #3, and encl (5). At the lowest deck, the barge deck, there is very little equipment other than hose racks and portable pump storage. The barge deck is completely open on all sides with no enclosures (PHOTO #4). The stern of the barge has a "key" slot to allow the barge to position the stern mounted derrick directly over a well. This deck is designed to allow it to be completely submerged while on location when the water depth exceeds the draft of the barge.



The second deck is approximately 85% enclosed with steel bulkheads, it accommodates Generators, mud tanks, mixing vats, mud pumps, parts storage space, and the electrical SCR (silicone control rectifier) Control Room (PHOTO #5).

The upper deck consists of a large, completely enclosed house (forward) which was the living quarters with a helo deck on top. A pipe rack is located amidships. The stern is the raised rig floor supporting the derrick and rotary table.

The rig was built in 1981. The construction plans were reviewed prior to construction by the American Bureau of Shipping (ABS), however, it cannot be verified if ABS actually oversaw the construction of this vessel. Since initial construction, the rig has neither been classed or re-inspected by ABS.

The rig holds a Coast Guard issued Certificate of Documentation bearing the Vessel Name Mr. Beldon, Official Number #644167, homeported in New Orleans, LA. Gross Tonnage – 1482, net tonnage – 1482. It has never been inspected by the Coast Guard and is not required to hold a Certificate of Inspection or be inspected by the Coast Guard.

There is no record that the rig has been classed or inspected by any regulatory agency or recognized society during initial construction or at any time since. There was no requirement for any of the personnel working on the MALLARD RIG 52 to hold any kind of Coast Guard issued license or Merchant Mariners Document.

INCIDENT:

(1) BLOWOUT: Extending through the well bore, as well as through the rams and preventors, was a five (5) inch drill pipe tool string through which mud was being circulated from the well. At the head of the drill pipe tool string, were two TIW valves spaced approximately 30 feet apart. The valves were installed to allow the drill pipe tool string to be shut off at the surface. Above the TIW valves, a swivel terminated the tool string. Above the swivel was the hook and traveling block of the rig derrick which was used to raise and lower the drill pipe tool string. A high pressure flexible hose led from the swivel to the shale shakers through which the mud traveled after being displaced from the well.

At approximately 21:15, Mr. Paul Standridge, floor Hand working at the shale shakers noticed a sudden increase in mud flow from the well and a slight amount of natural gas in the mud flow. He immediately reported this, over the rig's intercom system, to Mr. Daryl Prejean, the driller onboard the rig. Shortly thereafter, Mr. Prejean noticed a stream of mud leaking from the swivel, he also noticed a sharp increase in pump pressure, from approximately 900 PSI to 1700 PSI. At that time, the rig supervisor (Tool Pusher), Mr. Dillon Trahan, and the representative of Denburry Management, Mr. Johnny Chaddick ran from the tool pusher office in the crew quarters to the rig floor. Mr. Trahan shut the pipe rams, and Mr. Mike McCarthy, mud engineer for Batron, ordered the shutdown of the mud pumps.



Mr. Karl Primeaux was in the tool pushers office when the initial upset occurred. After Mr. Trahan and Mr. Chaddick left the office for the rig floor, Mr. Primeaux, upon his own initiative, rousted out the day crew and directed them to prepare for immediate evacuation to a tug boat tied to the rig. When Mr. Trahan came back to the tool pushers office after leaving the rig floor, he saw the day crew departing for the tug boat and mentally accounted for all evacuated personnel.

When the well was ordered shut in, Mr. Prejean turned off the mud pump, and with the assistance of Mr. Dillon Trahan, Tool Pusher, and person in charge-of-rig, attempted to close the lower of the two TIW valves (PHOTO #6). The valve was located approximately 10 ft. above the rig floor and was only accessible by ladder. In order to close the TIW valve, a removable wrench handle approximately 24" in length was inserted into the side of the valve (PHOTO #7). When the first attempt to close the valve was unsuccessful, Mr. Dillon Trahan lowered the traveling block and brought the TIW valve down to a height of approximately four feet from the rig floor. The TIW wrench was once again placed in the valve and a "cheater" bar (used to gain additional leverage), approximately .10 feet in length, was placed on the wrench handle (PHOTO #8). 6-7 rig personnel then attempted, unsuccessfully, to close the valves. They did succeed in bending the wrench handle.

At that time it was decided that it was impractical to lower the tool string any further to gain access to the upper TIW valve. A short while later the pressure in the well finished blowing out the remaining drilling mud, and the calcium chloride solution used to displace

the mud, along with natural gas started blowing from the well in the form of a finely atomized white mist.

Mr. Chaddick, in the mean time, went back to the Tool Pushers office and made a telephone call to Mr. Carry Redman, the Project Engineer for Denburry Management. According to Mr. Chaddick, Mr. Redman recommended that mud be pumped back into the well in a well kill attempt, but if the danger was too great, evacuate the rig.

When it became apparent that the well could not be shut in by the TIW valves, Mr. Dillon Trahan ordered the rig floor cleared and the crew assembled in quarters. He then proceeded to his office in the crews quarters. The remainder of the rig personnel assembled in the changing room adjacent to the Tool Pushers Office.

Mr. Trahan then had a telephone conversation with Mr. Leroy Broussard of Mallard Drilling. Mr. Broussard recommended that Mr. Trahan take any actions he deemed necessary, and use his own judgment in any decision to evacuate the rig. Mr. Trahan then went back to the rig floor and turned the pump back on to continue pumping calcium chloride into the well. The pump remained on throughout the remainder of the evolution. Mr. Trahan then returned to the tool pusher office.

(2) EVACUATION OF NON ESSENTIAL PERSONNEL: As stated earlier, when it became evident that a blowout had occurred, Mr. Karl Primeaux took it upon himself to evacuate nonessential personnel from the rig. Personnel were awakened from their quarters and



evacuated to a tug boat which was standing by at the rig. The following personnel were evacuated:

Sean Savage
Shane Redwing
Brian Miller
Karl Primeaux
Shane Vincent
Nicholas Jimenez
John Griffin
Leslie Rainer
Robert Davis
Clint Sonnier

(3) WELL KILL ATTEMPT: After a short consultation with the company man, Mr. Trahan ordered the crew to rig portable pumps and hoses to pump mud from the adjacent shale barge to the rigs slugging pit on the second deck. Then pump the mud from the pit into the well in a dynamic kill attempt. Mr. Trahan then went to the second deck to assist in rigging pumps. Once a portable pump was running, he went into the generator room and closed the door on the aft bulkhead (PHOTO #9). He then proceeded to the tool pushers office to cleanup. Mr. Chaddick also went to the second deck and checked on the progress of the pumps, once he saw that one was running, he went to the rig floor and to the shale shakers to see if personnel were still in those locations. He then went back to the tool pusher office to make another telephone call.

The theory behind a dynamic kill attempt is to fill the entire well annulus, and tool string, with a heavy weight drilling mud. The hydraulic pressure of column of mud in the well will overcome the gas or fluid pres-

sure present in the well formation and stop the flow. Large quantities of mud under very high pressure must be pumped into the well to achieve this hydraulic pressure overbalance. In order to calculate the weight of mud needed and the pumping pressure necessary, the Tool Pusher called the MISS DEE DEE (crew boat) and requested that the mud engineer, Mr. McCarthy, who had already been evacuated, return to the rig.

All of the mud pits on the second deck had previously been cleaned and contained no mud. The slugging pit had a piping configuration which allowed mud to be pumped from the pit directly into the well annulus. Large quantities of mud were needed and available in the shale barge adjacent to the rig.

Personnel were attempting to rig portable pumps and hoses to pump mud from the barge into the slugging pit. In order to rig the necessary pumps, hoses, and air lines (to power the pumps); personnel were moving between the barge deck level and the second deck level. After successfully starting the operation of one portable pump, personnel were dispatched from the second deck to the shale barge to tend the suction line. Additional personnel started rigging a second pump (PHOTO #10). This is the operation which was in progress when the explosion occurred.

(4) EXPLOSION: At approximately 21:45, a natural gas explosion occurred. Natural gas from the leaking well, over a time period of approximately 30-40 min. spread in explosive concentrations throughout the rig. The explosion most likely originated in the aft portion of the second deck. From there, the explosion quickly



spread, either in a series of secondary explosions, or in one continuous explosion, to other portions of the rig.

EXPLOSION DAMAGE: As a result of the explosion(s), the forward bulkhead of the generator room was displaced forward (PHOTO #11), and the aft bulkhead of the generator room was displaced aft (PHOTO #12 & 13). A hatch plate in the generator room overhead was propelled upward and clear of the rig. It was not located during the investigation (PHOTO #14). Just forward of the generator room, was the pump room. The starboard mud pump showed evidence of an internal explosion. A steel access plate to the motor was violently pushed out and deformed (PHOTO #15 & 16), a shaft guard on the port side of the pump was misaligned (PHOTO #17), and there were cracks in the welds holding the guard in place (PHOTO #18). From the pump room forward, for a distance of approximately 73 feet, the bulkheads were 1/2 height from the deck to a height of approximately four (4) feet (PHOTO #5). The upper portion was open and allowed air circulation. In this area, the lower portion of the starboard bulkhead was buckled outward, but was intact (PHOTO #19). The major force of the explosion in this area appears to have diffused through the open, upper half of the bulkhead. Two persons working in the vicinity of the mud tanks and pits in this area were propelled forward to the bow of the rig by the force of the explosion. Forward of that, the bulkheads enclose, forward, port & starboard, the remainder of the second deck. The majority of the damage from the explosion is contained to this area. In this area the deck was displaced downward approximately 2-4" (PHOTO #20-24). The overhead was displaced upward up to 8" (PHOTO #25 & 26). The

entire forward and port bulkheads, as well as the majority of the starboard bulkhead were opened outward (PHOTO #27-33). In this enclosed area, there was also major damage to equipment.

IGNITION SOURCE: From the explosion damage noted above, and interviews with Mallard Electricians, Mr. Jerry L. Dennis of U.S. Treasury Department, Bureau of Alcohol, Tobacco & Firearms. The most likely area of the source of ignition on the MALLARD RIG 52 was the pump room. This report does not conclusively identify the actual source of ignition.

According to Mr. Dennis, after examining photographs of the rig and the rig plans, the explosion most likely originated in the pump room. This is evidenced by the outward displacement of the aft bulkhead of the generator room (PHOTO #12 & 13), which was located just aft the pump room; by the outward displacement of the starboard bulkhead in the pump room and in the vicinity of the mud pits (PHOTO #19). Perhaps the most compelling reason to suspect that the explosion occurred in the pump room was the locations of the bodies of Mr. Duhon and Trahan who were both propelled forward along the second deck. In order for that to have occurred, the explosion must have originated aft of their last known location, the mud pits.

The damage to the wire mesh screening along the forward bulkhead of the generator room is believed to have occurred from a negative pressure vacuum following the initial explosion (PHOTO #11). This vacuum would also account for the door to the SCR Room which was found in the generator room (PHOTOS #34 & 35). The amount of damage in the generator room and SCR



Room does not support the explosion initiating in these areas.

Mr. Bobby Jordan, in his interview, stated that the mud pumps in the pump room were powered by electrical traction motors. These motors produced sparks while operating. The starboard mud pump was operating at the time of the explosion pumping calcium chloride solution into the well annulus. This was verified by Mr. Dillon Trahan. As stated earlier, the starboard mud pump shows evidence of an internal explosion in that an electrical access plate on the motor housing was damaged. The plate was both concaved and pushed outward. Two bolt holes at the top of the plate were elongated and torn where they were pushed loose from their retaining bolts. The bottom two retaining bolts on the plate held the bottom edge of the plate in place (PHOTOS #15 & 16). This starboard pump most likely the source of ignition for the larger explosion(s) which occurred on the MALLARD RIG 52.

DEATHS: There were four (4) deaths as a direct result of this explosion.

When the explosion swept forward on the 2nd deck, both Yancy Duhon and Clifford Trahan were reportedly in the vicinity of the mud pits. This was just aft of the location of the worst damage on the rig. Both were propelled forward along the second deck and through the now opened forward bulkhead (PHOTO #27) which had been ripped outward, and clear of the rig.

Mr. Frank Nunez was in charge of the Crew Boat MISS DEE DEE which was assigned to the rig. After the tug had left the rig, he was sent, in the crew boat, back to

the tug, to retrieve Mr. Mike McCarthy to assist in the well kill operation. Mr. Nunez and Mr. McCarthy were last seen standing on the bow of the second deck. During the explosion, the forward bulkhead of the second deck was blasted outward and across the location where they stood (PHOTO #27).

(1) YANCY DUHON: The body of Mr. Yancy Duhon was located directly forward of the bow of the rig resting on the bank, a distance of approximately 100 ft. Accordingly to Officers with the St. Martin Parish Sheriff Office who located the body, there was apparent damage to trees approximately 10 feet upon the area where Mr. Duhan was found, indicating that he struck the trees before coming to rest on the ground.

An autopsy was conducted on the body of Yancy Duhon by the St Martin Parish, Louisiana coroner, Dr. Kim Edward LeBlanc, MD. In the Coroner's report, the cause of death is listed as ACCIDENTAL, with a final diagnosis of: "Fatal intracranial open basilar skull fracture."

Post Mortem drug testing of Mr. Duhon was negative. Post-Mortem blood alcohol testing of Mr. Duhon indicated a Ethyl Alcohol BAC of 0.02% W/V. A notation on the a Laboratory report on Mr. Nunez from Acadiana medical Laboratories, LTD, the same laboratory which performed Post-Mortem alcohol testing on Mr. Duhon indicated that a similar level of Ethyl Alcohol may be present as the result of Post-Mortem Decomposition.



(2) CLIFFORD TRAHAN: The body of Mr. Clifford Trahan was located directly forward of the bow of the rig, in the water.

An autopsy was conducted on the body of Clifford Trahan by the St. Martin Parish, Louisiana coroner, Dr Kim Edward LeBlanc, MD. In the Coroner's report, the cause of death is listed as ACCIDENTAL, with a final diagnosis of: "Fatal intrathoracic rupture of heart and intra abdominal rupture of abdominal aorta."

Post Mortem drug and alcohol samples were taken during the autopsy performed on Mr. Trahan. The results of those tests are not yet available.

(3) FRANCISCO NUNEZ: The body of Mr. Francisco Nunez was located in the water on the starboard side, amidships, of the rig by a body drag.

An autopsy was conducted on the body of Francisco Nunez by the St. Martin Parish, Louisiana coroner, Dr. Kim Edward LeBlanc, MD. In the Coroner's report, the cause of death is listed as ACCIDENTAL, with a final diagnosis of: "Fatal intracrainal open basilar skull fracture and intrathoracic laceration of ascending aorta and avulsion of left lung and hemothorax and intraabdominal liver/spleen/kidney rupture."

Post Mortem drug testing of Mr. Nunez was negative. Post Mortem blood alcohol testing of Mr. Nunez indicated a Ethyl Alcohol BAC of 0.01% W/V. A notation on the a Laboratory report on Mr. Nunez from Acadiana medical Laboratories,LTD, indicated that this level of Ethyl Alcohol may be present as the result of Post-Mortem Decomposition.

(4) MIKE McCARTHY: Mr. Mike McCarthy appears to have been trapped between the forward bulkhead of the second deck, and a hand railing. When the explosion occurred, the forward bulkhead of the second deck pushed him against the hand railing. Part of Mr. McCarthy's body was located in the water approximately 50 feet from the starboard stern of the rig. The remaining portion of Mr. McCarthy's body was located in the water forward of the bow of the rig by a body drag.

INJURIES: There were two injuries associated with the explosion.

(1) BOBBY JORDAN, the rig electrician, was awakened, presumably by Mr. Primeaux. Since he was wearing ear plugs, he did not hear any evacuation order. He took the time to get dressed, and when he came out of his room, learned that a well blowout had occurred. He went to the door, and saw personnel working on the rig floor. Becoming concerned, he went to wake up the day crew and found them gone. At that time, he went to the bow of the rig and saw the tug boat backing away from the rig (evacuating the day crew). He then want back aft in the quarters and saw Mr. Trahan, Mr. Chaddick, and the night crew. He decided to stay out of the way and went back to his room to gather his possessions. From there he went to the aft door of the quarters and saw a "white mist" in the vicinity of the shale shakers. He became concerned about the possible presence of natural gas and went to the second deck to find Mr. Dillon Trahan. Once on the second deck, he did not find Mr. Dillon Trahan, but did observe other persons working on the pumps. He then went down the stairs on the bow of the rig, and went to the



Crew Boat MISS DEE DEE (PHOTOS #36-38) to get some ear plugs. He was standing on the back of the MISS DEE DEE when the explosion occurred. He received a blow to the head from an unknown object, was knocked to the deck, and had a piece of steel deck grating land on top of his body. He received injuries to his shoulder, head, neck, and back; twisted his ankle, and sustained broken ribs.

(2) JOHNNY CHADDICK was in the tool pushers office dialing the telephone when the explosion occurred. After the explosion occurred, he entered the main fore & aft passageway in the quarters house and attempted to exit at the forward door. His vision was obscured by smoke, and he encountered an unknown obstruction which prevented him from exiting at the bow. He then turned around and proceeded to the aft door. Upon exiting the quarters, he encountered heavy smoke and heat. He attempted to go down the ladder on the port side to the second deck, but was blocked by smoke. He then proceeded forward along the port side of the crew quarters along an overhanging catwalk (PHOTO #39). About 2/3 of the way forward along the crew quarters, he became trapped and could go no further forward. Smoke and heat prevented him from going aft. At that time, he saw a barge moored along the port side of the rig below his position, and decided to jump. When he landed, he was injured too badly to move. At that time, he saw the Crew Boat MISS DEE DEE leaving the vicinity of the rig. He found a life jacket close by and waved it, catching the attention of Mr. Aaron Stran on the boat, which turned around and picked him up. As a result of the fall, he received two broken ankles, a compression fracture of a vertebra, two bulging discs, a bruise on his arm, and persistent leg pain.

OTHER PERSONNEL ON RIG: At the time of the explosion, personnel were in the following locations on the rig:

(1) DILLON TRAHAN had just entered his quarters to clean up. He was having trouble seeing because of the well fluids on his glasses. He changed his shirt and was starting out of the door from his room into the Tool Pushers Office when the explosion occurred. He followed Mr. Chaddick, who was also in the office, forward along the center hallway of the quarters until they came to an obstruction. Mr. Trahan did not remember smoke in the passageway, but rather darkness. He then turned and went aft in the hallway to the aft door of the quarters. Upon exiting the quarters, he turned to his left, and went down the ladder to the second deck. From there, he proceeded forward to the bow. Once on the bow, he jumped from the second deck on to the aft deck of the MISS DEE DEE.

(2) DARYL PREJEAN: After rigging pumps on second deck, was ordered to the barge deck to tend the portable pump suction line. When the explosion occurred he was on the shale barge. He immediately proceeded to the MISS DEE DEE for evacuation.

(3) PAUL STANRIDGE: After assisting with pumps on the second deck, he was ordered to the barge deck to help rig a second pump. He was knocked to the deck by the force of the explosion, got up, and went to the MISS DEE DEE.

(4) GILBERT MARTIN: Working between the barge deck and the 2nd deck assisting in the rigging of air pumps. He happened to be on the barge deck when the



explosion occurred. He was knocked to the deck by the explosion, got up and proceeded to the MISS DEE DEE.

(5) AARON STRAIN: After helping to try and close the TIW valve, he went with the rest of the crew to quarters to await instructions. After being instructed to rig pumps, he proceeded to the second deck. After a few minutes on the second deck, his eyes started to burn from the "white mist" filling the deck in the vicinity of the pumps. At that time, he proceeded to the MISS DEE DEE. He was in the forward cabin of the MISS DEE DEE when the explosion occurred.

(6) JOE TRAVINO: No interview conducted.

ISSUES:

(1) EVACATION ORDERS: Mallard Drilling, upon request, submitted a complete copy of their company safety manual. Mallard Drilling does not have a separate and specific manual written for each of it's drilling rigs. There are no written procedures available for rig evacuation to be followed in the event of a well blowout. Mallard Drilling, however, does provide a "FIRE AND ABANDON PLATFORM DRILL" section in their safety manual (page A-14). It states that "all drills should be conducted in accordance to the posted station bill", and provides the following specifics (paraphrased).

a) Should be conducted "once a hitch" and include all personnel
b) Should be pre-planned and emphasize key points.
c) Alarm should be sounded as posted on station bill. Drill announcement should be made on PA system.

d) All personnel should report promptly to their assigned station unless excused to continue operations.
e) communications should be tested by notifying shorebase and standby boat.
f) All personnel wear PFD.
g) Document drill on IADC report.

I received a copy of a STATION BILL which was reportedly posted in the Tool Pushers Office aboard the MILLARD RIG 52. The bill addresseS procedures for: Fire and Emergency, Man Overboard, and Abandon Rig. The bill specifies that the rig general alarm system be activated immediately during any emergency evolution, and then goes on to delineate general responsibilities by position. It does not specifically address the occurrence of a blowout.

Records of emergency drills conducted aboard the MALLARD RIG 52 were obtained from Mallard Drilling during the course of this investigation. The records show that on average, emergency drills were conducted aboard the rig weekly. The drill sheet specifies that a muster of personnel be taken immediately during all drills. During this actual emergency, no formal muster was ever completed.

On page C-2 of the Mallard Drilling Safety manual, Paragraph 19 states that attendance at weekly safety meetings and participation in drills is mandatory.

According to the statement of Mr. Dillion Trahan and all other rig workers, with the single exception of Mr. Chaddick, at no time during the emergency did anyone sound the rig general alarm system. Nor did Mr. Dillon Trahan order an evacuation. Mr. Trahan was aware



that an evacuation of nonessential personnel had occurred, and distinctly remembered taking a quick mental accounting of personnel when he saw them leaving the rig.

Mr. Chaddick, in his interview, was adamant in his contention that Mr. Trahan sounded the rig alarm system. All other personnel interviewed consistently stated that no alarms were sounded. I cannot account for this discrepancy in statements.

No general evacuation of the on duty crew of the rig was ever conducted. At the time of the explosion, the decision to stay and kill the well had already been made by Mr. Trahan. This decision was made based on Mr. Trahan's assumptions that:

a) The natural gas blowing from the well was lighter than air and would not settle onto the rig.
b) The well could be brought under control in a reasonable amount of time.
c) Adequate equipment and supplies were available on scene to bring the well under control.

As stated earlier, Mr. Trahan had called his supervisor, Mr. Leroy Broussard, who recommended that Mr. Trahan use his own judgment to evacuate or control the well. Based on his own training and experience, Mr. Trahan decided to control the well. In retrospect, it has been shown that all of Mr. Trahan's assumptions were incorrect.

(2) TRAINING AND QUALIFICATION: Mr. Dillon Trahan, the Tool Pusher on the MALLARD RIG 52 had attended an U.S. Department of Interior, Minerals

Management Service (MMS) approved WELL CONTROL FOR DRILLING/COMPLETION & WORKOVER SUPERVISOR School in April, 1997. The course was instructed by Randy Smith Drilling Schools. A review of the course curriculum showed that the course is broken down into standards. Each standard then has performance criteria which must be met. The course focuses in recognizing early well control problems, developing a plan of action, and executing the plan. In a conversation with Mr. Jay O'Conner, Instructor for Randy Smith Drilling Schools, I found that the course does not address major failure of well control equipment, or when it is safer to abandon the rig then control the well. No class discussion was held on the topic of abandonment, and no case studies were presented in class which involved abandonment. Rig abandonment and total loss of well control are not covered by the MMS requirements for this course. Since this course is developed and approved by MMS, it is only required for operators of offshore drilling rigs.

Mr. Trahan also attended a OSHA approved CONFINED SPACE ENTRY & WORK ACTIVITIES AND THE DUTIES AND RESPONSIBILITIES OF THE OSHA DESIGNATED COMPETENT PERSON. This course of instructions covers the monitoring of confined spaces for the presence of flammable and oxygen deficient atmospheres. It does not address the monitoring of ambient air for the presence of flammable gases.

I received no other information regarding the training and qualification of Mr. Trahan. Mr. Trahan does have approximately 30 years of experience in oil field related work.



(3) BLOW OUT PREVENTORS: The installed outer (annulus) Blow Out Preventor stack (BOP's) are not at issue in this investigation. The BOP's were capable of sealing the well annulus, not a drill pipe or tool string. The annular preventor places a relatively low pressure (5000 PSI) rubber seal around the outside circumference of the pipe. The 5" pipe rams likewise place a seal around the pipe, but a higher pressure seal. Pipe rams are also capable of holding the pipe string from falling back into the well when disconnected from the traveling block. The blind ram can only be actuated when there is no pipe extending through the well bore. It consists of two interlocking, flat faced plates which, when fitted together, seal off the well bore. In this case, the only type of BOP which would have helped would have been a shear ram. A shear ram has two interlocking plates with cutting edges, which when closed, would have been capable of shearing through the well string, then sealing in the same manor as a blind ram. No shear rams were installed on this well, nor is it common practice to have them installed on inland drilling projects.

(4) TIW VALVES: The TIW valves in use may also be considered a BOP device. While it is evident that the lower TIW valve failed to operate as expected, the cause of that failure has not been pursued as part of this investigation. Reportedly, both TIW valves from the MALLARD RIG 52 were removed, boxed, and placed in storage after the rig was taken off location. No analysis or visual surveys of the valves have been conducted to determine the cause of their failure.

(5) GAS DETECTION: A fixed gas detection system was installed in the vicinity of the Shale Shakers on the

MALLARD RIG 52. This gas detection system was meant only to detect gas in the drilling mud. This system had installed audible alarms at the shale shakers, drillers console, and in the tool pushers office. Rig personnel all stated that they had heard the alarm the previous week, but could not tell if it was sounding when the well was flowing out of control due to the background noise level of the blowout. There is some indication that this system may have been turned off prior to the blowout. Mr. Chaddick stated that after mud wad pumped into the well and the packers in the well were set. The system was turned off.

The tool pusher also had at his disposal a "MSA WATCHMAN MULTIGAS DETECTOR". This piece of equipment is a portable explosive gas meter which measures flammable gases in % of lower explosive limit (LEL). The meter was typically kept on the tool pushers desk in his office. The meter was not available for my inspection as it was destroyed during the explosion and fire. The main use of the meter onboard the rig was to test enclosed spaces prior to entry. At no time, during the 30-40 min immediately proceeding the explosion, when the well was out of control did Mr. Trahan test the atmosphere at any location on the rig for the presence of explosive or flammable gases. When asked why, Mr. Trahan replied "I didn't smell gas".

(6) NATURAL GAS PROPERTIES: According to THE MERCK INDEX, NINTH EDITION, natural gas has the following properties:

Composed of: about 85% methane, 9% ethane, 3% propane, 2% nitrogen, and 1% butane.



With methane being the major component of natural gas, methane has the following properties: colorless, odorless, non-poisonous, flammable gas. Specific gravity (in air) 0.554. Forms explosive mixtures in air. Most explosive at 1 part methane/10 part air concentration. A 14% methane concentration in air burns without noise.

(7) Greenhill Petroleum, Timbalier Bay, October 1992.

In early October, 1992, the crew aboard an inland drilling rig (Posted Barge) was conducting a back surge operation under the supervision of a hired toolpusher when they lost control of the well. A blowout occurred, and approximately 42 1/2 hours later, the well ignited. The incident resulted in one injury, total constructive loss of the rig, and a total discharge of approximately 400,000 gallons of crude oil.

(8) Henry Production, Intracoastal City, July 1994.

A workover barge was conducting a well perforation operation on an existing well for Henry Production. During the operation, the well kicked, and became uncontrollable. During the second day of the blowout, the well ignited while well control teams were working in the vicinity, killing two persons, and injuring four others. Approximately 12,000 gallons of light crude oil was discharged from the well.

(9) Parker & Parsley Petroleum, Meyette Point, November 1996

While conducting workover operation on existing well with an inland drilling rig, the well kicked. When the annular blow out preventor (BOP) was shut in, a gasket on a flange below the BOP failed. After several attempts were made to secure the well, the rig was shut down and moved off location. No injuries or deaths. Approximately 15,000 barrels of light crude oil condensate discharged.

CONCLUSIONS:

1. A well upset occurred at approximately 2115, 16 June 97.

2. Personnel on the MALLARD RIG 52 were not able to bring the well back under control through the use of installed safety devices.

3. Natural Gas started blowing from the well shortly after the initial well upset and continued to blow from the well through the time the explosion occurred.

4. Natural gas spread, in explosive concentrations throughout the MALLARD RIG 52 except for hotel/office spaces located on the third deck.

5. Personnel in supervisory positions on the MALLARD RIG 52 did not recognize the hazard of an explosive natural gas/air mixture forming on the rig.

6. Personnel on the rig had a portable flammable gas detection device which they failed to use. There was no



written direction to use a portable gas detection device during well control operations.

7. Emergency and evacuation drills were conducted weekly on the MALLARD RIG 52 and documented in written reports.

8. Since a well control operation was being attempted, the available SCR shutdown switches were not used to de-energize the electrical systems on the MALLARD RIG 52.

9. When the well upset occurred, the established procedure of sounding a fire & emergency signal on the MALLARD RIG 52 general alarm system did not occur.

10. When the off duty crew was evacuated from the MALLARD RIG 52, the established procedure of sounding a abandon rig signal on the rigs general alarm system did not occur.

11. When the well upset occurred, the established procedure of mustering personnel and assigning tasks on the rig did not occur.

12. Mr. Trahan's responsibility was to direct emergency operations on the MALLARD RIG 52. Mr. Trahan did not direct the attempt to kill the well. Mr. Trahan did not direct the evacuation of any of the rigs personnel.

13. Mr. Chaddick's responsibility was to standby the telephone and radio on the rig and contact boats for evacuation. Mr. Chaddick did not stay in the tool pusher's office to carry out this responsibility.

14. The off duty driller, Mr. Karl Primeaux carried out his responsibility in clearing persons from the living quarters as per established procedures.

15. The off duty crew, with the exception of Mr. Bobby Jordan, evacuated from the rig IAW established procedures.

16. The Tool Pusher called his company office for instructions regarding whether to control the well or evacuate the rig.

17. The Company Man, Mr. Chaddick called his office for instructions regarding whether to control the well or evacuate the rig.

18. No specific company direction existed for blowout control.

19. Numerous sources of ignition existed on the MALLARD RIG 52. The actual source of ignition on the rig remains unknown.

RECOMMENDATION:

1. That state governments conduct regulatory oversight and enforcement of all Energy drilling and workover operations within state waters.



ENCLOSURES:

(1) Photographs 1-39
(2) Mallard Drilling, Safety Policy Manual, Pages A-14 & C-2
(3) Well Blowout Report as submitted to Louisiana Department of Natural Resources by Denbury Management, Inc.
(4) Mallard Rig 52 Station Bill
(5) Mallard Rig 52 plan
(6) Mallard Rig 52 Fire Control Plan
(7) Mqllard Rig 52 Certificate of Documentation
(8) Crew Boat Miss Dee Dee Certificate of Documentation
(9) Map showing Mallard Rig 52 on the well location

**APPENDIX E**

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

[DEC 23, 1980]

Honorable Walter F. Mondale
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

This is to transmit to you a report pursuant to section 4(b)(3) of the Occupational Safety and Health Act of 1970.

Respectfully submitted,

/s/ RAY MARSHALL
Secretary of Labor

Enclosure



U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

[DEC 23, 1980]

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This is to transmit to you a report pursuant to section 4(b)(3) of the Occupational Safety and Health Act of 1970.

Respectfully submitted,

/s/ RAY MARSHALL
Secretary of Labor

Enclosure

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

[DEC 23, 1980]

TO THE CONGRESS OF THE UNITED STATES;

I am submiting the enclosed report pursuant to section 4(b)(3) of the Occupational Safety and Health Act, which requires that the "Secretary of Labor shall, within three years after the effective date of the Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws."

Views within the Executive Branch on this matter have not been coordinated. Accordingly, this report reflects only the views of the Department of Labor. It is our view that there is at this time no need for legislation on this subject.

Respectfully submitted,

/s/ RAY MARSHALL
Secretary of Labor



## REPORT OF THE SECRETARY OF LABOR TO CONGRESS PURSUANT TO SECTION 4(b)(3) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, ON THE SUBJECT OF COORDINATION IN THE ADMINISTRATION AND ENFORCEMENT OF THIS ACT AND OTHER FEDERAL LAWS AFFECTING OCCUPATIONAL SAFETY AND HEALTH

### I. Introduction

This report by the Secretary of Labor is submitted to Congress pursuant to section 4(b)(3) of the Occupational Safety and Health Act of 1970, which provides:

> The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws.

### II. Background

The Occupational Safety and Health Act of 1970 is a comprehensive statute covering all employers who are engaged in a business affecting commerce and who have one or more employees and was designed to ". . . ensure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." In enacting this comprehensive statute, Congress also took into account those provisions of other Federal laws which, to various degrees, deal with

worker safety and health issues. Section 4(b)(1) states, in pertinent part, that:

> Nothing in this Act shall apply to working conditions with respect to which other Federal agencies . . . exercise statutory authority to prescribed or enforce standards or regulations affecting occupational safety and health.

Generally speaking, this language means that the OSH Act's protections apply only where there exist no legally enforceable standards or regulations of another Federal agency addressing a particular hazard. Under this framework, gaps in employee protections are avoided while at the same time the regulatory activity of the other agencies is not affected; viewed in this light, section 4(b)(1) places a limit only on the authority of the Department of Labor.

The OSH Act contains a detailed framework of enforcement and educational activities, including numerous employee rights, designed to achieve employee protection. Even where the OSH Act is preempted under section 4(b)(1), there is still an understandable expectation on the part of many employees and their representatives that the quality of protection and the range of rights afforded by the OSH Act would be provided for all workers and in all hazardous working conditions. The Department recognizes this concern and has taken steps to promote a coordinated approach to occupational safety and health programs throughout the Government by means of interagency agreements.



## III. Court and Review Commission Interpretation of Section 4(b)(1)

A number of decisions of the Occupational Safety and Health Review Commission (OSHRC) and the courts of appeals have interpreted section 4(b)(1). Several courts have ruled that workers may not be denied protection under the OSH Act for *all* hazards they face because their industry happens to be regulated in part by another federal agency which has issued rules for *some* worker hazards.

In other words, these courts hold that industries as such are not preempted from OSHA; rather, the preemption rule of section 4(b)(1) applies only to particular hazards. The courts have also held that in order for preemption to take place, the standard or regulation of the other agency must be in a final rule, not simply a notice of proposed rulemaking or an advance notice of proposed rulemaking.[1] At the same time, the evolving section 4(b)(1) law indicates that this preemption of OSHA does not depend on the efficacy of other agency's standards or its enforcement mechanisms.[2]

These and other cases are shaping current federal policies for worker safety and health. To be sure, there are remaining issues to be decided by the courts which

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[1] See *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); *Baltimore and Ohio R.R. Co.* v. *OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976); *Southern Railway* v. *OSHRC*, 539 F.2d 335 (4th Cir. 1976), cert. denied, 429 U.S. 999 (1976).

[2] See *Mushroom Transportation Co.*, OSHRC Docket No. 1588, 1973-74 CCH OSHD ¶ 16,881 (R.C. 1973), appeal dismissed (3rd Cir. 1974); *Pennsuco Cement and Aggregates, Inc.*, OSHRC Docket No. 15462, 1980 OSHD ¶ 24,478 (R.C. 1980).

will help further define the roles of the OSH Act and other federal laws in protecting workers. We are satisfied, however, that current case law in general has adequately preserved the primary intent of section 4(b)(1), which is to provide maximum worker protection contemplated by Congress in enacting the comprehensive OSH Act and at the same time to avoid duplication of effort by Federal agencies.

IV. Quality of Procession

There are only two federal agencies that deal exclusively with occupational safety and health and both of these are in the Department of Labor: the Occupational Safety and Health Administration and the Mine Safety and Health Administration. No other federal agencies have as their exclusive purpose the protection of workers from on-the-job injuries and illnesses. The statutes administered by other agencies that have an occupational safety and health role are designed primarily or in significant part to protect the public or equipment. Agencies of the Department of Transportation, for example, have as major purposes protecting the public and transportation equipment: i.e., the safe operation of trains (Federal Railroad Administration), aircraft (Federal Aviation Administration), certain vessels (Coast Guard), and certain trucks and buses (Bureau of Motor Carrier Safety). Because those agencies have other statutory functions, they cannot devote exclusive attention and resources to employee protection.

The absence of this primary focus on occupational safety and health has at times resulted in criticism of other agencies by employees, their representatives, and Congress concerning their programs. These criticisms



have related primarily to the efficacy of their enforcement activities.

In a recent example, a General Accounting Office Report, dated July 21, 1980, pointed out that the Department of Energy has not been properly implementing its safety and health programs for employees at its contractor-operated uranium enrichment plants. In another recent instance, flight attendants contended in Congressional hearings that the Federal Aviation Administration has no effective enforcement program for in-flight occupational hazards even though the FAA has maintained that it has full statutory authority over such hazards. In another example, the Coast Guard was criticized by Congress for failure to protect merchant seamen from the hazards of asbestos.

In addition to these criticisms that stem from multiple agency functions, many workers have voiced concern about the statutory mechanisms of some of the other agency programs as they relate to occupational safety and health. A number of the other Federal statutes under which workers are covered lack certain important provisions contained in the OSH Act which this Department has repeatedly stated are essential to strong occupational safety and health programs. These include:

- the right of employees to file anonymous complaints about alleged hazards and the responsibility of the agency to respond to those complaints;

- the right of employee representatives to accompany a federal inspector during investigations of working conditions;

- authority of the agency to propose monetary penalties as an incentive for employers to comply voluntarily with safety and health standards;

- authority to seek injunctions to protect employees in imminently dangerous situations; and

- authority to compel the prompt abatement of hazardous working conditions.

In addition, certain industry groups have on occasion complained of duplication and overlap by OSHA and other agencies in regulating and enforcing occupational safety and health concerns.

Numerous actions have been taken to deal with these concerns. Agreements between OSHA and other agencies have led to increased understanding, cooperation, reduction of overlap, elimination of recordkeeping duplication and consequent reductions in employers' paperwork burdens, use of OSHA standards by other agencies, and sharing of technical information and enforcement resources. A list of these Memoranda of Understanding is attached. Furthermore, OSHA has cooperated with other agencies in the formulation of legislative proposals dealing with occupational safety and health issues, such as trucking safety, that include compliance provisions parallel to those in the OSH Act.

V. Conclusions and Recommendations

Preventing duplication of effort and achieving coordination between the OSH Act and other Federal statutes is, in the Department's opinion, being adequately addressed under existing authority. As the



courts continue to refine the interpretation of section 4(b)(1) of the OSH Act, an even clearer picture of each Federal agency's role for worker safety and health will emerge. Federal policies will continue to be adjusted to conform to the court's interpretations. In addition, cooperative efforts between Federal agencies will continue to expand. The Department sees no need for, and therefore does not recommend, legislation on the subject of occupational safety and health jurisdiction.

**APPENDIX F**

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Authority To Prescribe and Enforce Standards or Regulations Affecting Occupational Safety and Health of Seamen Aboard Vessels Inspected and Certificated by the United States Coast Guard; Memorandum of Understanding

Thursday, March 17, 1983

Purpose

It is the purpose of this memorandum of understanding (MOU) to set forth clearly the boundaries of the authority of the United States Coast Guard (Coast Guard) of the U.S. Department of Transportation and the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor in prescribing and enforcing standards or regulations affecting the occupational safety and health of seamen aboard vessels inspected and certificated by the Coast guard (hereinafter "inspected vessels"). This MOU is intended to eliminate confusion among members of the public with regard to the relative authorities of the two agencies. Nothing in this MOU pertains to uninspected vessels. The Coast Guard and OSHA agree to work together to fulfill their respective authorities.



Authority of the Coast Guard

The Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of seamen aboard inspected vessels. Under the vessel Inspection Laws of the United States, the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard inspected vessels.

These comprehensive standards and regulations include extensive specific regulations governing the working conditions of seamen aboard inspected vessels as well as ample general authority regulations to cover these seamen with respect to all other working conditions that are not addressed by the specific regulations. These standards and regulations are generally set forth at 46 CFR Chapter I, and in the Coast Guard's Marine Safety Manual and its Navigation and Vessel Inspection Circulars.

OSHA has a general statutory authority to assure safe and healthful working conditions for working men and women under the Occupational Safety and Health (OSH) Act of 1970. Section 4(b)(1) of the OSH Act defines the relationship between OSHA and the other federal agencies whose exercise of statutory responsibilities may affect occupational safety and health. Based on OSHA's interpretation of section 4(b)(1), and as a result of the Coast Guard's exercise of its authority, described above, OSHA has concluded that it may not enforce the OSH Act with respect to the working conditions of seamen aboard inspected vessels. Nonetheless, OSHA retains the following responsibilities.

OSHA retains its authority under section 11(c) of the OSH Act, which forbids discrimination in any manner against employees who have exercised any right afforded them under the OSH Act. Pursuant to this provision, OSHA has the authority to require vessel owners to post a notice that informs employees of their right to complain about working conditions to the Coast Guard, OSHA, or the employer and to be free from retaliatory discrimination. OSHA has concluded that its exercise of authority under section 11(c) is not precluded by the scope of section 4(b)(1) of the OSH Act.

OSHA agrees to refer to the Coast Guard, for its consideration, any complaints, other than section 11(c) discrimination complaints, OSHA receives from seamen working aboard inspected vessels. However, the Coast Guard, consistent with the statement of its authority above, has the sole discretion to determine, under its applicable standards and regulations, whether the events complained of constitute hazardous conditions and the extent of any remedy that may be required.

Recordkeeping

OSHA and the Coast Guard will continue to discuss the extent of their respective jurisdictions to require owners of inspected vessels to keep records concerning occupational injuries and illnesses. This MOU does not resolve any issues concerning recordkeeping obligations.



Effective Date and Publication

This MOU shall take effect upon signature by the parties. It shall be promptly published in the Federal Register.

Dated: March 8, 1983.

James S. Garcey,
Comma[illegible]lant, United States Coast
Guard, Department of Transportation

Dated: March 4, 1983.

Thorne G. Auchter,
Assistant Secretary for Occupational
Safety and Health, Department of Labor

**APPENDIX G**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 99-60124

MALLARD BAY DRILLING, INC., PETITIONER

*v.*

ALEXIS HERMAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

---

Petition for Review of an Order of the
Occupational Safety and Health Review Commission

---

[Filed: Aug 8, 2000]

---

ON PETITION FOR REHEARING EN BANC

Before: POLITZ and DAVIS, Circuit Judges, and RESTANI, Judge.*

PER CURIAM:

(3 ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

---

* Judge of the U.S. Court of International Trade, sitting by designation.



requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP.P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 6 2000
CLERK

(2)

No. 00-0927

In The

# Supreme Court of the United States

ALEXIS M. HERMAN, SECRETARY OF LABOR,

*Petitioner,*

v.

MALLARD BAY DRILLING, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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36 PP.

## QUESTIONS PRESENTED FOR REVIEW

Respondent submits that the real issues for review are as follows:

1. Whether the Court of Appeals correctly decided that the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. §§ 651 *et seq.* and its implementing regulations do not apply to the working conditions of seamen working aboard vessels operating in navigable waters when the United States Coast Guard has been granted the statutory authority to promulgate and enforce regulations for the promotion of safety and health on such vessels and has in fact promulgated such regulations.

2. Whether the Court of Appeals correctly determined that the United States Coast Guard is the exclusive federal agency charged with the responsibility for regulating the working conditions of seamen on vessels – whether they be inspected or uninspected – on navigable waters such that OSHA's jurisdiction is preempted by the Coast Guard under § 4(b)(1) of the Act.

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## CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the Administrative Law Judge, OSHA Review Commission and Fifth Circuit Court of Appeals are contained in Petitioner's Appendix to its Petition for Writ of Certiorari. All references by Respondent in its Opposition Brief will be to those contained in Petitioner's Appendix.

## INTRODUCTION

The Petitioner's Brief incorporates virtually the same arguments unsuccessfully advanced by the Secretary of Labor in the Fifth Circuit Court of Appeals (*see* Decision rendered June 2, 2000, Appendix A, reversing the Order of the Occupational Safety and Health Review Commission dated December 28, 1998, *see* Appendix C at 20a-21a, vacating the citations issued against respondent by OSHA See Appendix B at 18a-19a, and rendering Judgment in favor of Mallard), and on Petition for Rehearing before the Fifth Circuit which was denied on August 8, 2000 (*see* Appendix G at 66a-67a). Since the arguments advanced by the Secretary in its Petition have been exhaustively considered and rejected on two separate occasions by the United States Fifth Circuit Court of Appeals, Respondent, Mallard Bay Drilling, LLC ("Mallard") submits that no worthwhile purpose would be served by responding in detail to the Secretary's lengthy Petition. The flaws in the Secretary's Petition are obvious. Nevertheless, since the Secretary's Petition is misleading, both factually and legally, Respondent respectfully

responds to those contentions which are legally erroneous and lack evidentiary support in the record.

## STATEMENT OF THE CASE

Mallard owns and operates drilling rigs and barges for oil and gas exploration from its principal place of business in New Iberia, Louisiana. Mallard is owner and operator of the MR. BELDON, otherwise designated as Mallard Rig 52, an inland drilling barge, (Official No. 644167), measuring 190 feet in length and 50 feet in breadth and weighing approximately 1,482 tons with its home port in New Orleans, Louisiana. The MR. BELDON is a special purpose drilling barge and one of ten classified deep drilling barges owned by Mallard in the United States. It is a non-self propelled barge which is moved to location by tugboat.

The MR. BELDON was built in 1981 and construction plans were reviewed by the American Bureau of Shipping ("ABS"). Following initial construction, the rig was neither classed nor reinspected by the ABS. While Rig 52 received a Certificate of Documentation from the United States Coast Guard, it is considered an uninspected vessel, i.e., it does not have a Coast Guard Certificate of Inspection.

While the MR. BELDON is classified as an uninspected drilling vessel, it nonetheless must comply with a plethora of Coast Guard regulations regarding navigation, safety, and working conditions of seamen. Douglas Halsey, a marine safety expert and 20-year Coast Guard veteran, who testified on behalf of Mallard, performed a



vessel inspection of the MR. BELDON. Halsey confirmed that the MR. BELDON's living quarters met or exceeded Coast Guard requirements for structural fire protection, habitability, machinery spaces, electrical distribution system, fire prevention, life saving, communication, abandon ship, training and safety programs. While the MR. BELDON was not manned by Coast Guard licensed personnel, all of its crewmembers were deemed to be "seamen" who were afforded protection under federal law as well as protection through the United States Coast Guard.

On June 16, 1997, the MR. BELDON was located at Little Bayou Pigeon, a navigable body of water in the Parish of St. Martin in the territorial waters of the State of Louisiana. On that date, the MR. BELDON was performing oil and gas drilling operations pursuant to a drilling contract with Denbury Management, Inc., drill operator on State Lease 411.

A blowout occurred during the evening hours in the course of drilling operations which resulted in the death and personal injuries of individuals. On the morning of June 17, 1997, three Coast Guard personnel, Captain John Grez, Lt. Jason Neubauer and Lt. Com. Ken Carlite of the U.S. Coast Guard, Marine Safety Office in Morgan City, Louisiana, conducted a full investigation into this casualty. The Coast Guard set up a command center in Butte Larose, Louisiana, and interviewed various Mallard employees, located both on the MR. BELDON and at its main office in New Iberia, Louisiana. The United States Coast Guard spent approximately six months investigating this matter at which time it submitted an extensive post casualty report. (See Appendix D)

OSHA, on the other hand, and in particular, its investigator, Mike Spohrer, conducted no investigation into this casualty. To quote Mr. Spohrer, he "stayed in the background" and did not personally interview any Mallard employees nor did he ever step foot aboard the MR. BELDON to conduct an actual inspection of the vessel itself. In short, he did nothing but "ride the coattails" of the investigation performed by the United States Coast Guard.

This case arises from citations issued against Mallard concerning the "working conditions" of "seamen" aboard the Mallard Rig 52, a/k/a MR. BELDON. Following this marine casualty, the Secretary issued the following citations for alleged violations of the Act:

(i) Serious citation for violation of Section 5(a)(1) of the Act for failing to timely evacuate employees on board the drilling rig;

(ii) Serious citation pursuant to 29 C.F.R. Section 1910.120(q)(1), for failing to develop and implement an emergency response plan to handle anticipated emergencies; and

(iii) Serious citation pursuant to 29 C.F.R. Section 1910.120(q)(6), for failing to train employees in emergency response.

Mallard answered the Complaint and also raised the defense that OSHA lacked jurisdiction to assess any penalties against it and/or said jurisdiction was preempted by the U.S. Coast Guard. Prior to the hearing, the Secretary and Mallard agreed that the parties would not litigate the merits of the citations; rather, the parties



consented that Mallard would pay stipulated penalties for the citations contingent upon an ultimate determination of the jurisdictional issues arising under Section 4 of the Act, 29 U.S.C. § 653.

The matter was tried before Administrative Law Judge Ken Welsch on April 27, 1998 in New Orleans, Louisiana. On November 10, 1998, the Administrative Law Judge ruled in favor of the Secretary on the jurisdictional issue. (See Appendix B at 9a) Mallard subsequently filed a Petition for Discretionary Review with the OSHA Review Commission which petition was denied by the Commission on December 28, 1998. Mallard timely filed its Petition for Review with the United States Court of Appeals for the Fifth Circuit on February 2, 1999, which reversed the decision of the OSHA Review Commission, vacated the citations issued against Mallard and rendered judgment in favor of respondent.

## SUMMARY OF ARGUMENT

Mallard respectfully submits that the Department of Labor lacks jurisdiction to assess any citation or penalties against Mallard which arise out of a marine casualty aboard the MR. BELDON. The United States Coast Guard is the exclusive federal agency charged with the responsibility of regulating the "working conditions" of "seamen" on vessels – whether they be inspected or uninspected – on navigable waters. OSHA is preempted by the United States Coast Guard since this matter involves a marine casualty over which the United States

Coast Guard has exclusive and pervasive jurisdiction and has, in fact, exercised that jurisdiction.

OSHA regulations do not apply to the MR. BELDON for several good reasons:

(1) The Coast Guard, not OSHA, has exercised its exclusive authority to provide safety standards for vessels;

(2) Excluding OSHA coverage of the MR. BELDON promotes uniformity in the law and precludes duplicity of federal investigations; and

(3) OSHA jurisdiction does not extend its reach to include vessels;

The Secretary strenuously argues that it has jurisdiction in this case due to the fact that the MR. BELDON is an uninspected vessel; however, the Secretary's argument misses the mark. Whether the MR. BELDON was an inspected or uninspected vessel is much ado about nothing. The long and short of this matter is this: the Coast Guard's jurisdiction over *all vessels on navigable waters* is complete and pervasive and is not diminished one iota by the categorization of a vessel as either inspected or uninspected. As both Chief Warrant Officer Grez and former Lt. Commander Douglas Halsey testified, the Coast Guard does, in fact, have jurisdiction to board, investigate, seize and even sink *uninspected* vessels. With that said, there can be little question but that the Coast Guard's regulations over uninspected vessels is pervasive and unencumbered.

Section 4(b)(1) provides that OSHA does not apply to the working conditions of employees regulated by other



federal agencies. Congress has delegated to the United States Coast Guard broad authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2. The Coast Guard has in fact exercised this authority and promulgated substantial regulations governing vessels operating on navigable waters and the crews on those vessels.

Moreover, preemption under Section 4(b)(1) does not depend upon the extent to which the other federal agency has exercised its statutory authority. The ALJ and Commission erroneously interpreted Section 4(b)(1) to allow for OSHA preemption only "as to those working conditions actually covered by the agency regulations." The Fifth Circuit properly rejected this "nook and cranny" interpretation of Section 4(b)(1).

Lastly, vessels operating in state territorial waters do not constitute "work places" within the meaning of Section 4(a) of the Act. Simply put, navigable waters are not one of the enumerated United States territories listed in that section.

## ARGUMENT

### I. The United States Coast Guard, Not OSHA, Is The Federal Agency Charged With The Responsibility For Regulating Safety Over Seamen.

This case concerns the jurisdictional issue of the applicability of OSHA standards to the working conditions of seamen aboard a vessel regulated by the United States Coast Guard. Section 4(b)(1) of the Act states:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

The United States Coast Guard has been granted statutory authority by Congress to ensure the safety and health of seamen who work aboard vessels such as the MR. BELDON. Congress established the Coast Guard as part of the Department of Transportation in 1915, several decades before OSHA was even passed. 14 U.S.C. § 1. Congress defined the Coast Guard's primary duties to include the following:

> The Coast Guard . . . shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department . . . 14 U.S.C. § 2.



Clearly, the living and working conditions of seamen aboard vessels are unique and differ substantially from those of employees in land-based work places. As aptly stated by this Court more than half a century ago, "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." *Southern S.S. Co. v. NRLB*, 316 U.S. 31, 38, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942).

The Fifth Circuit recognized that pursuant to this statutory grant of authority, the Coast Guard is the exclusive federal agency which exercises authority over the working conditions of seamen. *See Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). Accordingly, the Fifth Circuit correctly held that Section 4(b)(1) precludes the application of OSHA standards to the "working conditions" of "seamen".

*Clary v. ODECO, supra*, is the leading Fifth Circuit case to discuss the Coast Guard's preemption of OSHA jurisdiction with respect to the "working conditions" of "seamen" working on vessels in navigable waters. In *Clary*, the plaintiff-roustabout suffered a knee injury on a submersible drilling vessel when he tripped over a retaining wall on a rig. Pursuant to stipulation by the parties, the plaintiff sought recovery under the Jones Act and general maritime law. Plaintiff specifically alleged that it was a violation of OSHA regulations not to have the retaining wall upon which he tripped color coded yellow as to make it more visible. The trial court, however, refused to allow plaintiff to introduce into evidence OSHA regulations pertaining to color coding on the grounds that such regulations did not apply to vessels in

navigation. *Clary v. ODECO*, 429 F.Supp. 905 (W.D.La. 1977).

In affirming the decision of the trial court, the Fifth Circuit articulated three persuasive reasons for refusing to allow OSHA regulations proffered by plaintiff into evidence. *Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980). First, the Occupational Safety & Health Act provides:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting the safety or health. Section 4(b)(1) codified in 29 U.S.C. § 653(b)(1).

This Court then noted:

> The Coast Guard is the federal agency exercising statutory authority over the working conditions of seamen. Coast Guard regulations cover, among other things, standards governing the safety and health of persons working on vessels.

*Id.* at 1121.

Second, this Court emphasized that the OSHA commission has "disclaimed an intention to promulgate standards applicable to seamen," and has consistently conceded jurisdiction over the safety and health of seamen to the Coast Guard. Finally, the Court noted that the regulations proffered by plaintiff simply did not apply to a "special purpose drilling vessel in navigation." *See id.* at 1122.

Like the plaintiff in *Clary*, crew members aboard the MR. BELDON are seamen, not longshoremen. Like the plaintiff in *Clary*, the crewmembers aboard the MR. BELDON were assigned to a "special purpose drilling



vessel." Accordingly, as in *Clary*, the United States Coast Guard, not the Department of Labor, is the federal agency charged with responsibility for the safety and working conditions of seamen aboard the MR. BELDON.

At trial of the case *sub judice*, OSHA's representative, Mike Spohrer, was questioned regarding the purpose of OSHA's involvement in this matter. Spohrer testified that his investigation, like that of the Coast Guard, centered on the "working conditions" of the Mallard crew members. This is exactly what Congress has prescribed the United States Coast Guard to do in all instances! Spohrer's testimony is unequivocal:

> Q: Why was it necessary for you to review this [Memorandum of Understanding] during the course of your inspection?
>
> A: I wanted to be certain that I did have jurisdiction or that OSHA had jurisdiction in this case.
>
> Q: Now at the conclusion of your investigation, did you recommend the issuance of the citations that are at issue in today's hearing?
>
> A: Yes.
>
> Q: And was your recommendations [sic] accepted by your area director?
>
> A: Yes.
>
> Q: *All of the violations that are cited in the items located in the citation, do those conditions relate to the working conditions aboard the rig or to the navigational issues aboard the rig?*
>
> A: *Working conditions.* (emphasis added)

(TR 70-71)

Suffice it to say, this sounds the death knell for OSHA's alleged jurisdiction in this case.

Fifth Circuit precedent is crystal clear and its rationale is irrefutable. The United States Coast Guard, not OSHA, is charged with the exclusive responsibility for regulating and prescribing standards for the "working conditions" of seamen serving aboard vessels on navigable waters. The Coast Guard's jurisdiction preempts not only OSHA but every other federal agency which would otherwise attempt to assert jurisdiction over a marine casualty.

*Donovan v. Texaco Inc.* is a subsequent Fifth Circuit decision which reaffirms the rationale of *Clary* and establishes beyond cavil that OSHA jurisdiction is preempted in this matter. *Donovan v. Texaco Inc.*, 720 F.2d 825 (5th Cir. 1983). In *Donovan*, the plaintiff was a Coast Guard licensed engineering officer employed by Texaco in its deep sea fleet. Plaintiff initiated an action against Texaco based upon OSHA's prohibition of retaliatory discharge of a complaining employee. In rejecting the plaintiff's claim, the court succinctly stated:

> It is the law of this circuit that OSHA regulations do not apply to working conditions of seamen on vessels in navigation.

The Court then examined the language in Section 4(b)(1) and noted:

> Given *Clary*, which holds that with respect to seamen, the Coast Guard is such an agency for present purposes, we may redact this section as follows: **NOTHING IN OSHA SHALL APPLY TO WORKING CONDITIONS OF SEAMEN ON VESSELS**. (emphasis added)



The Fifth Circuit in *Donovan*, citing *Dillingham Tug & Barge Corp.*, 10 BNA OSHC 1859 (1982), noted that the Occupational Safety & Health Review Commission has itself concluded that OSHA has no applicability to the working conditions of seamen. Both the Commission and the Fifth Circuit recognized that 29 U.S.C. § 653(b)(1) "creates – in view of the Coast Guard's comprehensive regulation and supervision of seamen's working conditions – an industry-wide exemption for seamen serving on vessels operating on navigable waters." *Donovan*, 720 F.2d at 826.

The *Donovan* Court further opined that the regulatory authority of OSHA is completely abrogated for a particular industry if another federal agency exercises "general and pervasive" regulation of that industry. *Id.* at 826. The court concluded that the Coast Guard's regulation of vessels and seamen thus displaces OSHA coverage as to the safety and health of persons working on vessels. *Id.* at 826.

Little need be said regarding the Secretary's claim that the Memorandum of Understanding (see Appendix F) shifted responsibilities for the working conditions of seamen from the United States Coast Guard to OSHA. In short, the Memorandum of Understanding is not a congressional pronouncement; rather, it is an informal memorandum between two federal agencies. Congress is the only entity which can shift responsibility from the United States Coast Guard to another federal agency. Until such time that Congress enacts legislation which does shift responsibility for the working conditions of seamen aboard uninspected vessels from the Coast Guard to OSHA, neither the Commander of the United States

Coast Guard nor the Director for OSHA is at liberty to legislate responsibilities among themselves. See *Donovan v. Texaco, Inc.*, 720 F.2d 825, 827-28, n.3 (5th Cir. 1983), in which the Fifth Circuit made it quite clear to the Secretary and the Coast Guard that they are not authorized to overrule Congress' delegation of authority by shifting responsibilities for assuring the safe working conditions of seamen, stating: "It is not for modalities of the federal power to trade functions between themselves in perpetuity by agreement; the will of Congress must control." *Id.*

The United States Court of Appeals for the Fourth Circuit has likewise adopted the rationale of the Fifth Circuit. In *Taylor v. Moore-McCormick Lines, Inc.*, 621 F.2d 88, 92-93 (4th Cir. 1980), the Court stated:

> In summary, we think that Section 2, 14 U.S.C. makes it quite clear what is the proper delineation of responsibility between the Coast Guard and the Secretary of Labor in this area: The Coast Guard has responsibility for the safety of "seamen" under regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive. *Id.* at 92-93.

Mallard acknowledges that other circuits have reached a contrary result. *See In Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), *cert. den.*, 107 S.Ct. 271 (1986); *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. den.*, 105 S.Ct. 1355 (1985); however, these decisions are based on the erroneous



assumption that the Coast Guard has minimal responsibility for regulating safety on board uninspected vessels, and they completely ignore the Coast Guard's general grant of authority under 14 U.S.C. § 2 and the extensive regulations outside the sub-chapter entitled, "Uninspected Vessels."

**i. The Secretary's Characterization of the Mr. Beldon as an Uninspected Vessel Is a Red Herring.**

It is of no import whether the MR. BELDON is considered an inspected or uninspected vessel for purposes of OSHA jurisdiction. Simply put, the United States Coast Guard has exclusive responsibility for the safety and working conditions of seamen serving on vessels – both inspected and uninspected. Moreover, the United States Coast Guard has issued regulations and prescribed standards for safety on uninspected vessels in addition to inspected vessels. Numerous sections of the United States Code govern and regulate "in minute detail the rights and duties of seamen." *Donovan v. Texaco Inc.*, 720 F.2d 825, 828 (5th Cir. 1983). In those sections Congress has delegated to the Coast Guard the authority and responsibility for ensuring the safety of seamen and regulating the health of seamen aboard vessels operating on navigable waters.

Contrary to the Secretary's position, the Coast Guard regulates the working conditions aboard uninspected vessels as well as inspected vessels. The primary Coast Guard regulations applicable to seaman are contained in Chapter 1 of Title 46 of the Code of Federal Regulations.

This chapter is broken down into twenty-one subchapters. Subchapter C is entitled "Uninspected Vessel" and sets forth a number of specific regulations protecting against a variety of hazards which may arise in the working environment of seamen aboard uninspected vessels. These regulations are promulgated pursuant to Chapter 41 of Title 46 of the United States Code, in which Congress specifically delegated to the Coast Guard the authority to promulgate and enforce regulations governing uninspected vessels. This chapter of the U.S. Code is entitled "Uninspected Vessels Generally" and the statutes within the chapter make specific reference to safety equipment. *See* 46 U.S.C. § 4102.

The owner or operator of an uninspected vessel that does not comply with the statutory requirements or the Coast Guard regulations applicable to uninspected vessels may be subject to civil penalties and the Coast Guard can actually seize the vessel to satisfy the penalties. *See* 46 U.S.C. § 4106 ("the vessel also is liable *in rem* for the penalty"). This subchapter on uninspected vessels specifically states that the Coast Guard shall have a marine inspector to ensure that the regulations are adhered to and that the working conditions aboard uninspected vessels are safe. *See* 46 C.F.R. § 24.10-15.

The Secretary's position in this case is based on an erroneous assumption regarding the extent of the Coast Guard's authority over inspected vessels. The Secretary represents to this Court that the Coast Guard's regulation of inspected vessels is minimal; however, the Secretary's assertion does not wash when viewed against the facts.



Clearly the Coast Guard's authority is not limited to one chapter of the United States Code dealing specifically with uninspected vessels. As stated earlier, 14 U.S.C. § 2 delegates to the Coast Guard the general authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." This general grant of authority is much broader and *includes* safety issues on navigable waters, regardless of the type of vessel. *See Foremost Insurance Company v. Richardson*, 467 U.S. 668, 102 S.Ct. 2654, 2658-59 (1982) (admiralty and maritime rules must apply on navigable waters regardless of the type of vessel involved).

Indeed, numerous other Coast Guard regulations outside the chapter entitled "Uninspected Vessels" govern the working conditions of seamen aboard uninspected vessels. The obvious reason these other regulations are not included in the specific subchapter entitled "Uninspected Vessels" is because they apply to other types of vessels as well. Much like OSHA regulations, these regulations include safety standards and training requirements.

While the statutes and regulations discussed above are intended to prevent injuries aboard uninspected vessels, the Coast Guard has also promulgated regulations for investigating accidents and injuries on vessels when they do occur so that remedial action can be taken if necessary to safeguard against future accidents and injuries. All injuries, including deaths, which may occur on a vessel must be reported to the Coast Guard as required by 46 U.S.C. §§ 6301-6307. The Coast Guard has promulgated extensive regulations pursuant to these statutes for

the reporting and investigation of virtually all marine accidents. *See* 46 C.F.R. Part 4. These regulations apply to "any casualty or accident involving *any vessel* other than public vessels if such casualty or accident occurs upon the navigable waters of the United States." 46 C.F.R. § 4.03-1(a) (emphasis added). Thus, these regulations clearly apply – and even the Secretary concedes – to a privately owned uninspected vessel such as the MR. BELDON.

Moreover, these Coast Guard regulations require the reporting of a marine accident involving an uninspected vessel even when the accident results in no injuries. The regulations clearly specify that they cover *any* accident involving a vessel which *caused* damage "which might affect or impair the seaworthiness of the vessel." 46 C.F.R. § 4.03-1(b). In contrast, OSHA regulations require that employers keep a log of only "recordable" injuries (29 C.F.R. § 1904.2) and that only very serious accidents be reported. (29 C.F.R. § 1904.8). Thus, the Coast Guard regulations applicable to the reporting of accidents involving uninspected vessels are again more protective than OSHA regulations. Indeed, contrary to its reasoning in this case, the OSHA Review Commission fully recognized in its *Dillingham* decision that many other Coast Guard regulations outside those in the chapter entitled "Uninspected Vessels" apply to the working conditions of seamen on uninspected vessels. After discussing the safety regulations which pertain particularly to uninspected vessels, the Commission reasoned:

> In addition, various provisions of other subchapters such as subchapter P – entitled "Manning of Vessels" – apply to uninspected vessels



> as well as other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels as illustrated by the Coast Guard investigation that followed the accident involved in this case. *See* 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed and it enforces regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. *Dillingham Tug & Barge Corp.*, 10 BNA OSHC at 1861.

Indeed, the OSHA Review Commission recognized almost twenty years ago that the distinction between inspected and uninspected vessels makes no difference whatsoever under Section 4(b)(1) of the Act. In *Dillingham* the Commission noted that "the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case." *Dillingham*, BNA OSHC at 1861 n.6. Of course, there is no evidence whatsoever that the Coast Guard's authority or regulations have been diminished in any way since *Dillingham* was decided.

The court in *Donovan* went further to specifically reject the Secretary's contention that preemption under Section 4(b)(1) only applies if the Coast Guard has the specific regulation comparable to the OSHA regulation at issue. *Donovan*, 720 F.2d at 826-827. The Court reasoned that the Secretary's interpretation of Section 4(b)(1) is clearly contrary to Congressional intent:

> Section 4(b)(1) evidences a general Congressional intent to forbid overlapping regulation of

> working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion governmental proliferation and stultification of enterprise. Congress having declared against them in this instance it is not for us to disagree.

*Donovan,* at 827. The Court further explained:

> Section after section of the United States Code governs and regulates in minute detail the rights and duties of seamen, down to the form of shipping articles to be signed by them and the contents of their daily diet.

720 F.2d at 828.

The Secretary's false assumption is apparently based on the term "uninspected vessels" which is somewhat of a misnomer. Presumably, the name "uninspected vessel" was used simply because those vessels are not required to be inspected on a definite schedule as are those which are classified "inspected vessels." 46 U.S.C. § 2101(43) defines an uninspected vessel as "a vessel not subject to inspection under § 3301 of this title that is not a recreational vessel." This does not mean however that "uninspected vessels" are not subject to Coast Guard inspections or regulations. Rather, it simply means that they are not subject to Coast Guard inspections on a scheduled basis.

Indeed, the Coast Guard's treatment of uninspected vessels is quite similar to the Secretary's inspections of ordinary workplaces. The Secretary generally inspects workplaces following accidents based on an employee complaint or on a random periodic bases. Similarly, uninspected vessels are subject to Coast Guard inspections



following a marine accident pursuant to a complaint that a particular condition on a vessel is unsafe or unseaworthy and on random periodic bases. Thus, the Coast Guard's regulation of the working conditions of seamen on uninspected vessels is quite similar to OSHA's regulation of ordinary workplaces. Undoubtedly the Secretary believes she has exercised her authority to regulate the working conditions of ordinary work places even though she does not conduct regularly scheduled inspections of those work places. She cannot now credibly contend that the Coast Guard has not exercised its authority when it regulates uninspected vessels in much the same manner. Furthermore, the Coast Guard, not OSHA, has the particular expertise to promulgate and enforce safety regulations for seamen. Mallard respectively submits that OSHA's entry into marine casualties would only confuse and unnecessarily complicate matters- for marine employers as well as the Coast Guard.

## II. Preemption Of OSHA Standards Under Section 4(b)(1) Of The Act Does Not Depend Upon Whether The Coast Guard Has A Specific Regulation Identical To An OSHA Regulation

The Secretary argues that OSHA regulations are preempted under Section 4(b)(1) only if the Coast Guard has a specific regulation which is nearly identical to the OSHA regulation. The Secretary's reliance on the so-called "nook and cranny" theory is misplaced.[1]

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[1] The Fifth Circuit has coined the "nook and cranny" interpretation of Section 4(b)(1). *See Donovan v. Texaco Inc.*, 720 F.2d 825, 826 n.1 (5th Cir. 1983).

### i. The Nook and Cranny Theory Is Not Supported By The Language of Section 4(b)(1)

There is nothing in the wording of Section 4(b)(1) which makes its preemptive force contingent upon another federal agency having promulgated the same regulation; such an interpretation would make the statute entirely meaningless. The statute simply states that OSHA shall not "apply to working conditions of employees with respect to which other Federal agencies . . . *exercise* statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1) (emphasis added).

If preemption depended upon the extent to which another federal agency regulated a particular work environment some descriptive word or phrase would have been needed. For example, the statute could have stated that OSHA regulations do not apply to working conditions in which another federal agency has adopted safety and health regulations which provide "comparable protection" to employees. In fact, the Secretary has unsuccessfully advanced this "nook and cranny" theory to the Fifth Circuit. *See Donovan v. Texaco Inc.*, 720 F.2d 825, 826 n.1 (5th Cir. 1983).

### ii. The Phrase "Working Conditions Of Employees" Means The General Work Site In Which Employees Perform Their Daily Task

The "nook and cranny" interpretation of Section 4(b)(1) ignores the meaning of the phrase "working conditions of employees." According to the "nook and cranny" theory advanced by the Secretary each and every



OSHA regulation and standard would create a different working condition within the meaning of the jurisdictional statute. This interpretation is simply nonsensical.

The phrase "working conditions of employees" has been interpreted by the courts to mean the general area or work site in which employees perform their daily tasks. *See United Entergy Services, Inc. v. Federal Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994) (holding that power plant located next to and operating in connection with coal mine constituted "working conditions" within the meaning of Section 4(b)(1)); *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 916-17 (3d Cir. 1980) (defining "working conditions" as being "the discrete work site at a trench"); *Marshall v. Nichols*, 486 F.Supp. 615, 619 (E.D. Tex. 1980), reversed in part on other grounds; *Donovan v. Nichols*, 646 F.2d 190 (5th Cir. 1981) (holding that the entire offshore platform constituted the "working conditions for OSHA jurisdictional purposes").

In the instant case, the jurisdiction of the United States Coast Guard is uncontested. Chief Warrant Officer Grez was specifically questioned with respect to the Coast Guard's jurisdiction over the pertinent casualty and unequivocally testified that the Coast Guard is charged with the responsibility of investigating "marine casualties." Chief Warrant Officer Grez's testimony is illustrative:

Q: What was the purpose of your inspection?

A: The purpose was to investigate a marine casualty.

Q: What is a marine casualty?

A: A marine casualty covers a number of areas: fire, explosion, death, injury, among other criteria, yes, sir.

Q: *Was there any special legislation or regulation of the United States Code that would give you the authority to conduct such an inspection?*

A: *Yes. This investigation was conducted under authority of 46 C.F.R. part 4 as derived from authority in 46 U.S.C. 6301.*

Q: Are there certain conditions that designate whether or not a casualty is considered a marine casualty; a serious marine incident?

A: This one was designated as a serious marine incident. 46 C.F.R. 4.03-2 requires for a designation of a serious marine incident that one or more of the following occur: multiple injuries requiring medical attention, damage of property in excess of $100,000; and I believe there are other criteria in there also. (emphasis added)

Clearly then, the United States Coast Guard had jurisdiction and in fact exercised that jurisdiction in this case.

In short, the clear wording of Section 4(b)(1) states that if another federal agency has exercised statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health in some working environments then OSHA standards and regulations do not apply. It is up to that federal agency which has been empowered by Congress to act and regulate those working conditions to decide what rules and regulations are needed to ensure the health and safety of the employees. Thus, the Secretary cannot usurp authority to regulate these vessels; it must be left to the federal agency – in this



case the Coast Guard – which has been given the responsibility of dealing with that working environment.

### iii. The Secretary's "Nook And Cranny" Interpretation Is Inconsistent With Her Own Enforcement Activities

The Secretary's position that seamen can only be adequately protected through her "nook and cranny" interpretation of Section 4(b)(1) is also belied by her own enforcement activities. Simply because there may not be a specific regulation governing every piece of equipment aboard a vessel does not mean that the working conditions of seamen are not adequately protected and regulated.

The concept of "seaworthiness" under maritime law is quite broad and covers virtually every possible health and safety hazard on vessels. If a piece of equipment or machinery aboard a vessel is unsafe or not fit for its intended use, then it presents an unseaworthy condition for which the owner or operator of the vessel is liable. *Mahnich v. Southern SS Company*, 321 U.S. 96, 99, 64 S.Ct. 455, 457 (1944). If a member of the crew is not properly trained this also presents an unseaworthy condition on the vessel. *Mahnich*, 321 U.S. at 103, 64 S.Ct. at 459. In short, any unsafe or unhealthy condition to which seamen aboard a vessel may be exposed, regardless of whether the vessel is classified as inspected or uninspected, presents an unseaworthy condition for which the owner or operator of the vessel is responsible.

Federal statutes ensure the seaworthiness of the vessel even in foreign ports and provide procedures for

seamen to protest if any part of the vessel is unsafe or unfit. *See* 46 U.S.C. § 10905. Thus seamen are actually provided greater protection than that afforded by OSHA since OSHA does not apply outside the United States and certain U.S. territories. *See* 29 U.S.C. § 653(a). The duty to provide a seaworthy vessel for seamen is much like the general duty clause imposed by OSHA on land-based employers under 29 U.S.C. § 654(a)(1). The Secretary has never hesitated to investigate and issue citations to employers under the general duty clause even though a specific OSHA regulation has not been violated. *See, e.g., Secretary of Labor v. Morrison-Knudsen/Yonker's Contracting Co.*, 16 BNA OSHC 1105, 1120-21 (No. 88-572, 1993); *Secretary of Labor v. Trans-Texas Well Service, Inc.*, 15 BNA OSHC 2219, 2220 (No. 91-0391, 1992).

It is disingenuous for the Secretary to now argue that her authority is broader than the specific regulations she promulgates but that other federal agencies such as the Coast Guard are limited in their authority and can only act if they have a specific regulation governing specific hazards. The Coast Guard has been empowered by Congress to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2. If the Coast Guard has been less than diligent in fulfilling its responsibilities that is an issue to be addressed by Congress, not OSHA.



## III. OSHA Jurisdiction Does Not Reach Vessels

A plain reading of the scope of OSHA as contained in its introductory paragraph does *not* extend its reach to include vessels. The Act provides that the geographic reach of OSHA is confined to "employment performed in a work place in a state . . . [and] Outer Continental Shelf Lands." 29 U.S.C. § 6539(a). As such, the Fifth Circuit has previously held that a vessel is not such a "work place." *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983).

## IV. Petitioner's Reliance On Legislative History Is Misplaced

The legislative history of the Occupational Safety and Health Act manifests a clear congressional intent *not* to subject employers to the jurisdiction of both OSHA and another federal agency when that other federal agency has an affect on the occupational safety and health of working conditions over which that other federal agency both possesses and uses (in a manner which that other federal agency deems appropriate) statutory authority.

In the words of Mr. Steiger, one of the chief proponents of the Occupational Safety and Health Act:

> Both the substitute and H.R. 16785 provide that the Act shall not apply where another federal agency is exercising authority to prescribe or enforce occupational safety and health standards . . . While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health but has taken no action, it is anticipated that these instances will be

> exceedingly rare. It is intended that the Secretary of Labor will *not* exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcements. (Legislative History of the Occupational Safety and Health Act of 1970 "Legislative History", Subcommittee on Labor of the Committee on Labor and Public Welfare," 92nd Congress, 1st Session, p. 997).

Subjecting employers to double agency jurisdiction obviously involves a waste of the employer's resources. Congress expressly indicated an intent not to impose such a burden on employers. Section 8(d), 29 U.S.C. § 657(d) of the Occupational Safety and Health Act requires that information "shall be obtained with a minimum burden upon employers . . . " and that "[u]nnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible."

Subjecting employers to double agency jurisdiction involves a waste of administrative resources, too. Congress expressly indicated an intent not to waste national administrative resources through overlapping agency jurisdiction. Section 4(b)(3) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(3) indicates the clear legislative intent "to avoid unnecessary duplication and to achieve coordination between this act and other Federal laws." The legislative history of Section 4(b)(3) clearly expresses Congress's determination "to avoid probable areas of duplication." 1970 Code Cong. & Adm. News, p. 5199.



Congress undoubtedly had in mind trying to avoid the waste of employer administrative and judicial resources which would inevitably result from overlapping agency jurisdiction when it said in Conference Report No. 91-1765 on the Occupational Safety and Health Act:

> It is understood by the conferees that in any enforcement proceedings brought under either this Act or under such other acts, the principle of collateral estoppel will apply. 1970 U.S. Code Cong. Adm. News, p. 5229.

That is exactly the case here! The United States Coast Guard performed an exhaustive investigation into this casualty, issued a certified blue ribbon report and absolved Mallard of any wrongdoing. OSHA, without performing any independent investigation of its own, simply copied the investigation material of the Coast Guard and then issued its proposed citation and penalties.

Congress clearly intended to give the Coast Guard exclusive jurisdiction to regulate marine safety and health conditions in recognition of the Coast Guard's special expertise in the marine area rather than to share jurisdiction between the expert Coast Guard and the inexpert (in the marine casualty area) Occupational Safety and Health Administration. It is up to the Coast Guard to decide what constitutes appropriate safety standards. If the Coast Guard decides that no regulation need be promulgated concerning a particular condition, that decision comprises the minimum safety standard. OSHA cannot prescribe a higher safety standard when the Coast Guard has decided that no regulation is needed.

This Court should follow the rationale expressed in the following language by an earlier Occupational Safety and Health Review Commission case: "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations governing the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." *Mushroom Transportation Co., Inc.*, 1 BNA OSHC 1390, 1392 (1973).

## CONCLUSION

In conclusion, the U.S. Fifth Circuit Court of Appeals, arguably the preeminent circuit court in the country, has reached the correct interpretation in this case. The Fifth Circuit's decision is in complete harmony with both congressional intent and federal regulatory framework. Accordingly, the Secretary's Petition is devoid of merit and should be denied.

DATED, this 8th day of January, 2001.

Respectfully submitted,

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No. 00-927

# In the Supreme Court of the United States

HENRY L. SOLANO, ACTING SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The Secretary of Labor seeks this Court's review of a decision of the United States Court of Appeals for the Fifth Circuit holding that the Occupational Safety and Health Act (OSH Act) does not apply to the working conditions of seamen aboard uninspected vessels. As we have explained in our petition for a writ of certiorari, that decision squarely conflicts with the holdings of three courts of appeals. Pet. 9-10. More generally, the decision departs from the consensus of other courts of appeals that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), on which the Fifth Circuit relied, does not confer an industry-wide exemption from the Act's coverage based on limited regulation by another agency of employees in a particular industry. Pet. 10-11. We

also explain in the petition that the issue addressed by the court of appeals is an important one. Pet. 19-21.

Respondent acknowledges (Br. in Opp. 14) that there is a conflict among the courts of appeals and does not dispute the importance of the issue. Instead, respondent opposes this Court's review (*id.* at 8-30) only on the ground that respondent considers the decision of the court of appeals to be correct. The merit of the court of appeals' decision, however, does not warrant denial of review when, as respondent acknowledges, the decision has created a circuit conflict on a question of recurring importance. See Sup. Ct. R. 10. Moreover, as we explain in the certiorari petition (at 12-19), and contrary to respondent's contention, the court of appeals' decision is incorrect.

1. As respondent acknowledges (Br. in Opp. 14), the courts of appeals are in conflict on the question presented. The Second, Ninth, and Eleventh Circuits have each upheld regulation by the Occupational Safety and Health Administration (OSHA) of working conditions on uninspected vessels. *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1244-1245 (9th Cir. 1998); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1531 (11th Cir.), cert. denied, 479 U.S. 883 (1986); *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 780 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985). The Fifth Circuit in this case disagreed and held that only the Coast Guard can regulate working conditions of seamen on uninspected vessels. Pet. App. 3a-7a; see also *id.* at 66a-67a (denying petition for rehearing en banc).

In addition, the Fifth Circuit's decision conflicts more generally with decisions of the District of Columbia and Fourth Circuits holding that Section 4(b)(1) does not authorize industry-wide exemptions from OSH Act coverage based on limited regulation by another



agency. *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1053-1054 (D.C. Cir. 1976) (per curiam); *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.), cert. denied, 429 U.S. 999 (1976); accord *Tidewater Pac.*, 160 F.3d at 1245; *Norfolk Dredging*, 783 F.2d at 1531; *Red Star*, 739 F.2d at 778.[1]

2. In addition to acknowledging the conflict, respondent does not dispute that the question presented is important. As we describe in our petition (at 19-20), the effect of the decision of the court of appeals is to leave the crews of several thousand uninspected vessels within the Fifth Circuit with no statutory or regulatory protection from serious threats to their occupational safety and health, except for a few Coast Guard rules addressing a few hazards on only some uninspected

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[1] Respondent suggests (Br. in Opp. 13, 14, 18-19) that the Fourth Circuit and the Occupational Safety and Health Review Commission share the Fifth Circuit's position on OSH Act coverage of uninspected vessels. That is incorrect. The Fourth Circuit decision on which respondent relies, *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980), did not address OSH Act coverage of working conditions of seamen on uninspected vessels, but instead held that a longshoreman could not rely on a Coast Guard regulation to support a negligence action against a shipowner. As for the Commission decision cited by respondent, *Secretary of Labor* v. *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982), subsequent Commission decisions have held that uninspected vessels are covered by the OSH Act and have rejected a reading of *Dillingham* that would endorse an industry-wide exemption from OSH Act coverage. See *Secretary of Labor* v. *Tidewater Pac., Inc.*, 17 O.S.H. Cas. (BNA) 1920, 1923-1924 (1997), aff'd, 160 F.3d 1239 (9th Cir. 1998); *Secretary of Labor* v. *Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1704-1705 (1992). The ALJ relied on those precedents in finding OSH Act coverage in this case, see Pet. App. 13a-17a, and the Commission itself elected not to review the ALJ's decision, thereby rendering it the final decision of the Commission, see *id.* at 20a.

vessels. Indeed, respondent tacitly acknowledges that the issue in this case is important to employers as well as employees, because respondent contends (erroneously) that the rule followed by all the other courts of appeals "[s]ubject[s] employers to double agency jurisdiction" and therefore "involves a waste of the employer's resources." Br. in Opp. 28.

3. a. In our petition (at 12-19), we explain that the Fifth Circuit's decision in this case is incorrect. Contrary to the view of the Fifth Circuit, Section 4(b)(1) does not create industry-wide exemptions from the OSH Act based on limited exercises of regulatory authority by other federal agencies. Rather, the OSH Act is displaced only when another agency actually has regulated the working conditions at issue or has articulated a policy that the working conditions should not be regulated. Because the Coast Guard has neither regulated the working conditions at issue here nor articulated a policy that they should not be regulated, the OSH Act continues to apply.

That understanding of Section 4(b)(1) follows from its text, the history surrounding its enactment, the Secretary of Labor's long-standing interpretation, and the purpose of the OSH Act. Section 4(b)(1) provides that "[n]othing in [the OSH Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). As all the courts of appeals (including the Fifth Circuit) agree, that language expressly provides that OSH Act coverage is displaced only when another agency actually has "exercise[d]" its statutory authority to regulate occupational safety and health by prescribing or enforcing regulations or by articulating a policy that



regulation is not warranted. See Pet. 13 & n.6 (citing cases).

The text of Section 4(b)(1), which limits preemption of OSH Act coverage to "working conditions * * * with respect to which" another agency has exercised such authority, also makes clear that another agency's exercise of its authority to regulate some working conditions of some employees within an industry does not create an industry-wide exemption from OSH Act coverage. See Pet. 14 (citing cases). The drafting history of the provision confirms that this language was used precisely in order to limit the circumstances in which the OSH Act is superseded to "*particular* working conditions regarding which another Federal agency exercises statutory authority." S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis added); see Pet. 15. That understanding is also reflected in long-standing OSHA regulations, a 1980 report by the Secretary of Labor to Congress, and three decades of citations for OSH Act violations. See Pet. 16. Finally, the Secretary's interpretation of Section 4(b)(1) advances the OSH Act's express purpose "to assure so far as possible *every* working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b) (emphasis added).

We further explain in the certiorari petition that, if the court of appeals had applied the proper interpretation of Section 4(b)(1) in this case, the court would have concluded that Coast Guard action has not displaced the OSH Act. See Pet. 17-18. Although the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen aboard inspected vessels, the vessel at issue in this case, the Mr. Beldon, is an uninspected vessel. See *ibid.*; Pet. 4, 12 & n.5. The Coast Guard has regulated

only a few working conditions on uninspected vessels. See 46 C.F.R. Pts. 24-26 (implementing 46 U.S.C. 4102 (1994 & Supp. IV 1998)). The working conditions at issue in this case are the hazards posed by oil drilling operations on uninspected vessels. The Coast Guard has not regulated those working conditions. It therefore has not exercised any authority that displaces OSH Act coverage of those conditions.

b. Respondent begins its defense of the Fifth Circuit's decision by arguing (Br. in Opp. 8-13) that its holding is dictated by Fifth Circuit precedent. That contention is, however, irrelevant to whether the decision is correct. Respondent therefore attempts to bolster its defense by asserting (*id.* at 6-7, 15-21) that the distinction between inspected and uninspected vessels is of no import because "the Coast Guard's regulations over uninspected vessels is [*sic*] pervasive and unencumbered" (*id.* at 6). As we have explained, however, that assertion is incorrect. Coast Guard regulations directed at uninspected vessels cover only a limited range of health and safety hazards on only certain uninspected vessels. See Pet. 4; 46 C.F.R. Pts. 24-26 (Subch. C). Those regulations do not address the particular working conditions faced by employees engaged in oil drilling operations, and they do not even apply to the Mr. Beldon, which is an uninspected barge that does not carry passengers for hire. See 46 C.F.R. 24.10-27; *id.* § 24.05-1 (Table 24.05-1(A) (Col. 6)).[2]

[2] Respondent asserts (Br. in Opp. 3) that its expert witness "confirmed that the MR. BELDON's living quarters met or exceeded Coast Guard requirements for structural fire protection, habitability, machinery spaces, electrical distribution system, fire prevention, life saving, communication, abandon ship, training and safety programs." That assertion is both unsupported by the record and irrelevant. First, respondent's witness testified only that the living quarters on a "sister vessel" (ALJ Tr. 130, 142) met Coast Guard regulations for "inspected vessels" (*id.* at 143). Second, and more fundamentally, those regulations do not apply to the Mr. Beldon. Respondent's further assertions (Br. in Opp. 29) that the Coast Guard "absolved Mallard of any wrongdoing" in this case and "decided that no regulation is needed" of the hazards that led to the deaths of respondent's employee's are also incorrect. The Coast Guard report identified several shortcomings in respondent's safety procedures, Pet. App. 48a-50a, and referred the matter to OSHA because the Coast Guard lacked applicable regulations, *id.* at 12a, 24a-25a.



Notably, respondent does not identify a single Coast Guard regulation that addresses the safety hazards posed by oil drilling operations on uninspected vessels. The reason for that omission is simple: no such regulation exists.[3]

Respondent also argues (Br. in Opp. 21-26, 27-30) that the Secretary's interpretation of Section 4(b)(1) is incorrect. That argument, however, is based on a misreading of the Secretary's interpretation. Contrary to respondent's characterization (*id.* at 21), the Secre-

[3] Respondent asserts (Br. in Opp. 17) that "numerous other Coast Guard regulations outside the chapter entitled 'Uninspected Vessels' govern the working conditions of seamen aboard uninspected vessels." The only regulations that respondent identifies, however, are those concerning reporting and investigation of marine casualties (46 C.F.R. Pt. 4), which, as we note in our petition (at 5 n.1), apply to both inspected and uninspected vessels. Even though marine casualties may, in some instances, result from unsafe working conditions, regulations that govern reporting and investigation of casualties that have already occurred do not regulate those working conditions themselves. Although uninspected vessels may become subject to certain additional Coast Guard regulations because of the particular activities in which they engage at a particular time, the Coast Guard has no ongoing, substantial regulations of the working conditions of employees on uninspected vessels other than those specified in the subchapter governing those vessels.

tary does not take the position that "OSHA regulations are preempted under Section 4(b)(1) only if the Coast Guard has a specific regulation which is nearly identical to the OSHA regulation." Rather, as we have explained, the Secretary's position, which is shared by the Coast Guard and the rest of the United States government, is that "the proper inquiry under Section 4(b)(1) is whether the Coast Guard has regulated the particular working conditions with respect to which OSHA seeks to enforce its own safety and health standards or has articulated a policy that the working conditions not be regulated." Pet. 17. Also contrary to respondent's contentions (Br. in Opp. 21, 22, 25), the government's approach is not a "nook and cranny" theory. Displacement of OSHA regulation can occur with regard to either a specific working condition or a set of working conditions with respect to which an agency has comprehensive statutory authority and has indicated that its exercise of that authority is sufficient. See Pet. 12 n.5. Indeed, that is precisely why OSHA and the Coast Guard agree that Coast Guard regulation *has* displaced OSH Act coverage of the working conditions of seamen on *inspected* vessels. See *ibid.* (citing Memorandum of Understanding *reprinted in* Pet. App. 62a-65a). But OSHA and the Coast Guard also agree that the Coast Guard's limited regulation of some working conditions on some uninspected vessels has not displaced OSH Act coverage of all working conditions on all of those vessels.

Finally, respondent errs in contending (Br. in Opp. 22-25) that the Secretary's interpretation is based on a misreading of the phrase "working conditions of employees." Contrary to respondent's contention, "working conditions" means particular hazards encountered by an employee in the course of his or her job



activities. See Pet. 18 n.8; see also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974) (technical meaning of "working conditions" in the language of industrial relations is a worker's "surroundings"—"the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency"—and "hazards"—"physical hazards regularly encountered, their frequency, and the severity of injury they can cause"). As we have acknowledged, not all the courts of appeals accept that definition of "working conditions," Pet. 18 n.8 (citing cases), but it is the Secretary's long-standing interpretation. In any event, as we explain in the certiorari petition (at 18 n.8), even under the "environmental definition [of working conditions espoused by respondent], it is apparent that the Coast Guard regulation of uninspected vessels is not so pervasive as to preempt [OSHA] jurisdiction as to any particular portion of such vessels nor as to such vessels in whole." *Tidewater Pac.*, 160 F.3d at 1245-1246.[4]

* * * * *

[4] Respondent also argues (Br. in Opp. 7, 27) that the Mr. Beldon is not subject to the OSH Act because a vessel "operating in state territorial waters" is not a "workplace in a State" under 29 U.S.C. 653(a). That argument was not addressed by the court of appeals, Pet. App. 7a, and is, in any event, without merit. See *Tidewater Pac.*, 17 O.S.H. Cas. (BNA) at 1923 (OSH Act applies to territorial waters within a State); Pet. App. 13a (ALJ decision, following *Tidewater Pac.*).

For the foregoing reasons, and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 00-927

# In the Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether the United States Coast Guard has "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" concerning the "working conditions of employees" (29 U.S.C. 653(b)(1)) on "uninspected vessel[s]" (46 U.S.C. 2101(43)) so as to displace application of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

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*v.*

MALLARD BAY DRILLING, INC.

*ON WRIT OF CERTIORARI*
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## BRIEF FOR THE PETITIONER

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 212 F.3d 898. The decision and order of the Occupational Safety and Health Review Commission (Pet. App. 8a-19a, 20a-21a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 2, 2000. A petition for rehearing was denied on August 8, 2000 (Pet. App. 66a-67a). On October 27, 2000, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including December 6, 2000. The petition was filed on December 6, 2000, and was granted on February 20, 2001. 121 S. Ct. 1076. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), provides, in relevant part:

> Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

## STATEMENT

1. a. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). Each employer covered by the Act has a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). Each employer must also comply with applicable occupational safety and health standards promulgated by the Secretary of Labor. 29 U.S.C. 654(a)(2). The Secretary has delegated her authority under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). See 65 Fed. Reg. 50,017 (2000).

The OSH Act applies to "employment performed in a workplace in a State," as well as in specified territories and "Outer Continental Shelf lands." 29 U.S.C. 653(a). When the Act was passed, certain federal agencies already had statutory authority to regulate the occupational safety and health of employees in particular



fields, such as transportation and mining. To avoid duplication of effort, Congress provided in Section 4(b)(1) of the Act that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

OSHA regulations explain that:

> Section 4(b)(1) of the Act provides that the statute shall be inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions. Therefore, a person may be considered an employer covered by the Act, and yet standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority.

29 C.F.R. 1975.1(b). The regulations further explain that, in enacting Section 4(b)(1), "Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection." 29 C.F.R. 1975.3(c).

b. The United States Coast Guard "administer[s] laws and promulgate[s] and enforce[s] regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department." 14 U.S.C. 2. The extent of the Coast Guard's

statutory authority over a vessel depends in large part on whether the vessel is "inspected" or "uninspected." See generally 46 U.S.C. 2101 *et seq.*, Subtit. II (1994 & Supp. IV 1998) (vessels and seamen). "Inspected" vessels, listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998), include, for example, freight vessels, passenger vessels, seagoing motor vessels, tank vessels and certain types of barges. See also 46 U.S.C. 2101 (1994 & Supp. IV 1998) (definitions of different vessel types). "Uninspected vessel[s]" are vessels not subject to inspection under Section 3301 that are not recreational vessels. 46 U.S.C. 2101(43).

"[T]o secure the safety of individuals and property on board" inspected vessels, the Secretary of Transportation has comprehensive rulemaking authority over those vessels, including their design, construction, alteration, repair, and operation. 46 U.S.C. 3306(a) (1994 & Supp. IV 1998). The Coast Guard has exercised that authority on behalf of the Secretary by issuing comprehensive regulations. See generally 46 C.F.R. Ch. I; 49 U.S.C. 108(b) (Commandant of Coast Guard shall exercise powers delegated by Secretary of Transportation); 49 C.F.R. 1.46(b) (delegating authority to Commandant).

In contrast to its broad authority over inspected vessels, the Coast Guard's statutory authority to issue regulations for uninspected vessels is limited to specific topics, including fire extinguishers, life preservers, flame arrestors or backfire traps, ventilation, and emergency locating equipment. See 46 U.S.C. 4102 (1994 & Supp. IV 1998). The occupational safety and health of workers on uninspected vessels, therefore, are largely unregulated by the Coast Guard, as Coast Guard regulations cover only a limited range of health and safety hazards on only certain uninspected vessels. See



primarily 46 C.F.R. Pts. 24-26 (implementing 46 U.S.C. 4102 (1994 & Supp. IV 1998)).[1] Of particular relevance here, the Coast Guard has not regulated, and does not have authority to regulate, hazards presented by oil drilling operations on uninspected vessels operating on inland waters.

In light of the foregoing statutory and regulatory provisions, OSHA and the Coast Guard have entered into a memorandum of understanding (MOU) that clarifies the division of authority over working conditions on vessels. 48 Fed. Reg. 11,365 (1983), *reprinted in* Pet. App. 62a-65a. The MOU explains that the Coast Guard generally has exclusive authority over the working conditions of seamen aboard inspected vessels. *Id.* at 63a. The MOU specifically states, however, that it does not apply to uninspected vessels. *Id.* at 62a. Consequently, OSHA generally exercises authority over such vessels unless a Coast Guard regulation applies to the

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[1] The Coast Guard is authorized to require reporting and to conduct investigations of marine casualties involving both inspected and uninspected vessels. 46 U.S.C. 6101-6104; 46 U.S.C. 6301-6308 (1994 & Supp. IV 1998). The Coast Guard has exercised that authority. See 46 C.F.R. Pt. 4. Other Coast Guard regulations also apply to uninspected vessels under certain circumstances. To the extent that those regulations address occupational safety and health hazards, they generally apply only to particular types of vessels engaged in particular activities. See, *e.g.*, 33 C.F.R. Ch. I, Subch. N (regulating mineral exploration and production activities of vessels operating on the outer continental shelf) (promulgated under authority of 43 U.S.C. 1333); 46 C.F.R. Pt. 197, Subpt. B (regulating commercial diving operations connected with a deepwater port, a deepwater port safety zone, or the outer continental shelf, as well as those conducted from any inspected vessel) (promulgated under authority of 33 U.S.C. 1509 (1994 & Supp. IV 1998); 43 U.S.C. 1333; 46 U.S.C. 3306 (1994 & Supp. IV 1998); 46 U.S.C. 3703).

specific working condition at issue. See OSHA Instr. CPL 2-1.20(R) at 14 (Nov. 8, 1996) (Secretary's Exhibit C-2).

2. a. Respondent Mallard Bay Drilling, Inc., conducts oil and gas drilling operations. Pet. App. 10a. On June 16, 1997, four of respondent's employees were killed and two others seriously injured in an explosion on the *Mr. Beldon*, a drilling barge located on Little Bayou Pigeon, a navigable waterway within the State of Louisiana. *Id.* at 2a. The drilling barge, which does not carry passengers for hire, was classified by the Coast Guard as an uninspected vessel. *Id.* at 6a, 27a. Near the end of the drilling operation, the well blew out. *Id.* at 11a. The off-duty crew evacuated, but the on-duty crew stayed aboard in an unsuccessful attempt to regain control of the well. *Id.* at 23a. Thirty to forty minutes later, the explosion occurred. *Id.* at 32a.

The Coast Guard conducted a marine casualty investigation of the incident. See note 1, *supra*. The Coast Guard determined that explosive concentrations of natural gas had spread throughout the atmosphere of the barge as a result of the blowout. Pet. App. 32a. It found that the explosion most likely originated in the pump room, where a motor was operating that could have produced sparks to ignite the natural gas. *Id.* at 34a-35a. The Coast Guard concluded that respondent had not issued any specific directions regarding blowout control; that respondent's supervisory personnel had not followed respondent's existing emergency procedures; and that they had not recognized the hazard of explosive gas accumulations on the barge and had not ordered the evacuation of on-duty personnel. *Id.* at 48a-50a. Because the Coast Guard had not promulgated regulations governing those matters, however, it took no enforcement action and referred the matter to OSHA. *Id.* at 12a, 24a-25a.



b. Based on the report and other information from the Coast Guard, OSHA cited respondent for three violations of the OSH Act. Pet. App. 2a. OSHA alleged that respondent had violated the Act's general duty clause, 29 U.S.C. 654(a)(1), by failing to evacuate employees in a timely manner after the well blowout. Pet. App. 9a. OSHA also alleged that respondent had violated particular OSHA standards by failing to develop and to implement an emergency response plan, as required by 29 C.F.R. 1910.120(q)(1), and by failing to train employees in emergency response, as required by 29 C.F.R. 1910.120(q)(6). Pet. App. 9a.

Respondent did not contest the merits of the citation but argued before the Occupational Safety and Health Review Commission (Commission) that respondent was not subject to the OSH Act for two reasons. First, respondent contended that the drilling barge was not a "workplace in a State" under 29 U.S.C. 653(a); and, second, respondent argued that the Coast Guard regulatory scheme rendered the OSH Act inapplicable under 29 U.S.C. 653(b)(1). Pet. App. 2a.

The administrative law judge (ALJ) affirmed the citation. Pet. App. 8a-19a. The ALJ held that the barge was a "workplace in a State" because it was located within the territorial boundaries of Louisiana. *Id.* at 12a-13a. With respect to preemption of OSHA authority under 29 U.S.C. 653(b)(1), the ALJ held that OSHA authority is preempted only as to those working conditions actually covered by another agency's regulations. Pet. App. 14a-15a. Because respondent made no showing that any Coast Guard regulations addressed evacuation and emergency response to releases of hazardous substances on uninspected vessels, *id.* at 15a,

16a, the ALJ concluded that the Coast Guard had not exercised authority to regulate the working conditions at issue and that OSHA authority was therefore not preempted under 29 U.S.C. 653(b)(1). Pet. App. 18a. The Commission declined review, and the ALJ's decision became final agency action. *Id.* at 20a-21a (citing 29 U.S.C. 661(j)).

c. Respondent sought review of the Commission's decision in the United States Court of Appeals for the Fifth Circuit, which reversed. Pet. App. 1a-7a. The court of appeals held that OSHA lacks authority to regulate the working conditions of respondent's employees under 29 U.S.C. 653(b)(1). Pet. App. 3a, 7a. The court therefore declined to address respondent's alternative contention that the barge was not a "workplace in a State" within the meaning of 29 U.S.C. 653(a). Pet. App. 7a.

The court noted that, under Fifth Circuit precedent, "OSHA regulations do not apply to *working conditions* of *seamen* on *vessels* in navigation" because "the Coast Guard has exclusive authority over the working conditions of seamen." Pet. App. 3a-4a (citing *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983), and *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120, 1121 (5th Cir. 1980)). The court rejected the Secretary's contention that those cases were distinguishable because they involved inspected, rather than uninspected, vessels. Pet. App. 4a-6a. The court found "no indication from *Clary* that the barge in that case was inspected," and the court emphasized that "the broad language of *Clary* does not turn on any such distinction." *Id.* at 5a.[2] The court noted that the Coast

[2] In fact, the United States flag vessel in *Clary* was a mobile offshore drilling unit operating on the outer continental shelf. *Clary* v. *Ocean Drilling & Exploration Co.*, 429 F. Supp. 905, 906 (W.D. La. 1977), aff'd, 609 F.2d 1120, 1122 (5th Cir. 1980). As such, it was a "seagoing barge[]" subject to inspection under the Act of May 28, 1908 (Seagoing Barge Act), ch. 212, § 10, 35 Stat. 428 (as amended by Act of June 4, 1956, ch. 350, § 3, 70 Stat. 225), the predecessor to 46 U.S.C. 3301(6).



Guard is expressly authorized by 46 U.S.C. 4102 (1994 & Supp. IV 1998) to issue certain safety regulations for uninspected vessels and that the Coast Guard has exercised that authority. Pet. App. 5a-6a (citing 46 C.F.R. 25.01 *et seq.* and 46 C.F.R. 26.01 *et seq.*).[3] The court of appeals therefore reaffirmed its conclusion in *Texaco* that "the Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry-wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters." *Id.* at 6a (quoting 720 F.2d at 826).[4]

## SUMMARY OF ARGUMENT

A. The Occupational Safety and Health Act of 1970 (OSH Act or Act) applies to the working conditions in this case because the Coast Guard has not exercised statutory authority to regulate them, as Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), requires in order for the Secretary's authority under the OSH Act to be displaced. The plain language of that Section provides

[3] The regulations cited by the court of appeals govern life preservers and other lifesaving equipment, emergency locating equipment, fire extinguishers, flame arrestors, backfire traps, engine ventilation, cooking, heating, and lighting systems, garbage discharge and some operating procedures on certain uninspected vessels. See also p. 4, *supra* (describing hazards addressed by 46 U.S.C. 4102).

[4] *Texaco* also involved a vessel (an oil tanker) subject to Coast Guard inspection. See *Donovan* v. *Texaco, Inc.*, 535 F. Supp. 641, 642 (E.D. Tex. 1982), aff'd, 720 F.2d 825 (5th Cir. 1983).

that OSHA's authority is displaced only when another agency has "exercise[d]" its authority to promulgate or enforce standards or regulations affecting occupational health or safety. The agency may "exercise" its authority either by affirmatively promulgating regulations or by articulating a policy determination that regulatory requirements are not warranted. Section 4(b)(1) further provides that the OSH Act is displaced only as to the "*working conditions* * * * with respect to *which*" the other agency has exercised its authority. 29 U.S.C. 653(b)(1) (emphasis added). The history surrounding the enactment of Section 4(b)(1) shows that Congress rejected bills that would have allowed the mere possession of statutory authority by another agency to preempt the OSH Act or that would have made preemption turn on whether the agency has regulated any working conditions of the affected employees.

Thus, the correct inquiry to determine whether the OSH Act is displaced under Section 4(b)(1) is whether another federal agency has actually exercised its statutory authority—either by promulgating standards or regulations governing the working conditions at issue or by articulating a policy that requirements not be imposed with respect to those conditions. That inquiry reflects Section 4(b)(1)'s goal of avoiding duplicative federal regulation of occupational safety and health without undermining the OSH Act's purpose to ensure "every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). Section 4(b)(1)'s preemption rule is similar to one that the Court has used to determine whether federal law preempts state law in situations in which the federal statutory scheme embodies a balance of interests similar to the balance that underlies Section 4(b)(1). See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89,



110 (2000) (relevant preemption inquiry under Title I of the Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.*, is "whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all").

B. The court of appeals therefore erred in concluding that Section 4(b)(1) creates an industry-wide exemption from the OSH Act for seamen serving on all vessels (including uninspected vessels) by virtue of the Coast Guard's regulation of some working conditions on certain vessels. Under the appropriate Section 4(b)(1) analysis, Coast Guard action has not displaced the OSH Act with respect to the working conditions involved in this case. The Coast Guard has comprehensive statutory authority over *inspected* vessels, and it has exercised that authority so as to displace OSH Act coverage of all working conditions of seamen on those vessels. See Pet. App. 63a. The Coast Guard, however, does not have and has not exercised comprehensive authority over the working conditions on *uninspected* vessels. Therefore, whether OSH Act coverage is displaced with respect to the working conditions on the uninspected vessel in this case turns on whether the Coast Guard has addressed the particular working conditions at issue.

The Secretary and most courts of appeals interpret the term "working conditions" to mean occupational safety and health hazards that an employee encounters on the job. Those hazards include not just physical hazards, but also environmental hazards, such as toxic chemicals and fumes in an employee's surroundings. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974). In this case, the relevant working conditions are the conditions faced by employees on an uninspected

barge engaged in inland oil drilling operations when a well backs up, spreads natural gas into the vessel's atmosphere, and thereby creates the risk of explosion. Because the Coast Guard's statutory authority to regulate occupational safety and health on uninspected vessels is limited, its regulations cover only a limited range of hazards, and they do not address hazards presented by oil drilling operations on inland waters. The Coast Guard also has not decided, and has no statutory authority to decide, that those hazards should not be subject to particular safety and health requirements. Accordingly, there is no Section 4(b)(1) preemption under the Secretary's interpretation of "working conditions."

The Third and Fourth Circuits have adopted a different interpretation of "working conditions" that equates that term with an environmental area in which an employee customarily works, and those courts consequently find preemption whenever an agency regulates that physical area. That interpretation inappropriately defines "working conditions" without reference to the OSH Act's specific concern with conditions affecting occupational safety and health and mistakenly focuses on a physical *area* instead of on conditions *within* that area. Furthermore, the area-based definition of working conditions results in gaps in worker protection that are inconsistent with the OSH Act's purpose to provide comprehensive protection. The courts of appeals that have adopted this "area" definition have applied it narrowly, however, so that the focus is on the particular area presenting a hazard rather than on the entire worksite. Therefore, use of those courts' area-based definition would make no difference in this case. The relevant area would be the atmosphere on an uninspected barge operating on inland waters. The



Coast Guard has neither regulated that area nor determined that regulatory requirements should not be imposed.

C. To the extent that the language of Section 4(b)(1) is ambiguous, the Court should accept the Secretary's interpretation of the Section because that interpretation best furthers the OSH Act's central purpose to assure as far as possible that every working man and woman in the Nation has safe and healthful working conditions. The Secretary's interpretation furthers that purpose by preventing gaps in coverage. In contrast, the interpretation adopted by the court of appeals would frustrate that purpose by creating gaps in worker protection, because the OSH Act would be displaced for working conditions that the Coast Guard and other federal agencies do not—and in this case cannot—regulate. As a result, thousands of employees would be left without federal regulatory protection from workplace health and safety hazards. The Secretary's interpretation is also fully consistent with Section 4(b)(1)'s goal of preventing OSHA and other federal agencies from regulating the same health or safety conditions.

The Secretary's interpretation is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Secretary administers and enforces the OSH Act. Her interpretation of Section 4(b)(1) is set out in thirty years of citations in enforcement proceedings, as well as in a long history of regulatory coordination with other agencies, longstanding regulations, and a statutorily-mandated report to Congress. To the extent that there is ambiguity concerning the proper interpretation of Section 4(b)(1), the Secretary's reasonable interpreta-

tion should therefore control. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).

## ARGUMENT

### THE OCCUPATIONAL SAFETY AND HEALTH ACT APPLIES TO THE WORKING CONDITIONS IN THIS CASE BECAUSE THE COAST GUARD HAS NOT EXERCISED STATUTORY AUTHORITY TO REGULATE THEM

The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, "establishes a comprehensive regulatory scheme designed 'to assure so far as possible . . . safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin* v. *OSHRC*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. 651(b)). Consistent with that design, the Act generally applies to all employment performed in any workplace in the several States and territories, as well as on outer continental shelf lands. 29 U.S.C. 653(a). At the time the Act was passed, however, certain federal agencies already had statutory authority to regulate the occupational safety and health of employees in particular fields. Congress therefore provided in Section 4(b)(1) of the OSH Act, as an exception to the general rule of universal coverage, that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

The question in this case is whether the United States Coast Guard, through its limited regulations concerning uninspected vessels (as defined in 46 U.S.C. 2101(43)), has exercised authority over the working conditions of employees on those vessels so as to



displace application of the OSH Act to all the working conditions of those employees. The court of appeals held that the Coast Guard's regulation of some working conditions on certain uninspected vessels creates an "industry-wide exemption [from the OSH Act] for seamen" on all vessels. Pet. App. 6a (quoting *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983)). In so holding, the court of appeals departed from the long-standing view of the Secretary and the consensus of other courts of appeals that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), does not confer an industry-wide exception to the Act's coverage based on limited regulation of the safety and health of employees in the industry by another agency. See pp. 16-19 & note 8, *infra* (citing cases).

As we explain below, the interpretation of Section 4(b)(1) adopted by the court of appeals in this case is inconsistent with the statutory text and the history surrounding Section 4(b)(1)'s enactment. Under Section 4(b)(1) properly construed, the Occupational Safety and Health Administration (OSHA) retains authority to regulate the working conditions at issue here because the Coast Guard's regulations of occupational safety and health on uninspected vessels do not address those working conditions. To the extent that there is any ambiguity about the correct interpretation of the OSH Act, the Secretary's long-standing interpretation of Section 4(b)(1) should control because, unlike the interpretation embraced by the court of appeals, the Secretary's interpretation furthers the purpose of the OSH Act and is entitled to deference.

### A. The OSH Act is displaced only when another federal agency has exercised its statutory authority with respect to the working conditions at issue

Section 4(b)(1) provides that the OSH Act does not apply "to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. 653(b)(1). Under the terms of that Section, and in accordance with the longstanding interpretation by the Secretary and the courts of appeals, OSH Act coverage is displaced only when another agency has actually exercised its statutory authority with respect to the working conditions at issue. See, *e.g.*, *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir.), cert. denied, 479 U.S. 883 (1986); Pet. App. 55a-58a (1980 Report of the Secretary of Labor to Congress Pursuant to Section 4(b)(3) of the OSH Act (Secretary's Report)); 29 C.F.R. 1975.1(b), 1975.3(c). Displacement can occur with regard to either a specific working condition or a set of working conditions with respect to which an agency has comprehensive statutory authority and has indicated that its exercise of that authority is sufficient.[5]

Section 4(b)(1)'s preemption rule gives primacy to authority exercised under "other Federal laws which, to various degrees, deal with worker safety and health issues," but without undermining the OSH Act's purpose to ensure "'every working man and woman in the

[5] Further, if the other agency has exercised its statutory authority, OSH Act coverage is displaced regardless of whether the other agency's requirements are the same as or different from, or are more or less stringent than, the requirements that would apply under the OSH Act. See Pet. App. 56a.



Nation safe and healthful working conditions.'" Pet. App. 55a-56a (Secretary's Report) (quoting 29 U.S.C. 651(b)). Workers are not "denied protection under the OSH Act for *all* hazards they face because their industry happens to be regulated in part by another federal agency which has issued rules for *some* worker hazards." *Id.* at 57a. "Under this framework, gaps in employee protections are avoided while at the same time the regulatory activity of [other agencies with authority to regulate occupational safety and health in particular industries] is not affected." *Id.* at 56a. Section 4(b)(1) thus reflects Congress's intent "to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection," but at the same time not "to grant any general exemptions under the Act." 29 C.F.R. 1975.3(c).[6]

1. That understanding of Section 4(b)(1) follows from its text, which states that OSH Act coverage is displaced when another federal agency "*exercise[s]* statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1) (emphasis added). As all the courts of appeals to address the question have agreed, that language indicates that another agency's mere possession of statutory authority to regulate occupational safety and health is not sufficient to oust OSHA juris-

[6] See also *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 780 (2d Cir. 1984) (rejecting interpretation of Section 4(b)(1) that would result in coverage gaps), cert. denied, 470 U.S. 1003 (1985); *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976) (per curiam) (same); *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 391 (5th Cir. 1976) (same), cert. denied, 434 U.S. 874 (1977); *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.) (same), cert. denied, 429 U.S. 999 (1976).

diction. The other agency must also have actually "exercise[d]" that authority.[7]

An agency generally exercises its authority by promulgating standards or regulations that address particular occupational safety and health hazards. See, *e.g.*, *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 917 (3d Cir. 1980) (discussing regulations issued by the Department of Transportation's Office of Pipeline Safety to address the risk of gas ignition during a "hot tap" of a natural gas pipeline). But an agency may also "exercise" its authority by articulating a policy that existing regulation is sufficient and no additional requirements are warranted. See *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1530; *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 391-392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977). Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (explaining that state law is preempted when the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"); cf. also pp. 22-23, *infra*.

The text of Section 4(b)(1) also makes clear that a federal agency's exercise of authority to regulate some working conditions of some employees within an industry does not create an industry-wide exemption from OSH Act coverage. By its terms, the text limits pre-

[7] See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1530 (11th Cir.); *Red Star Marine Servs., Inc.*, 739 F.2d at 778 (2d Cir.); *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 915 (3d Cir. 1980); *Southern Ry.*, 539 F.2d at 336-337 (4th Cir.); *Southern Pac. Transp. Co.*, 539 F.2d at 389 (5th Cir.).



emption to "*working conditions* of employees with respect to *which*" other federal agencies exercise authority. 29 U.S.C. 653(b)(1) (emphasis added). If Congress had intended to create industry-wide exceptions to OSH Act coverage based on limited regulation by other agencies, Congress could have provided that the Act would not apply to "*industries* in which" other agencies regulate occupational safety and health. Or Congress could have displaced OSH Act coverage of "working conditions of employees with respect to *whom*" other agencies exercise such authority. Congress's decision not to do so reinforces the conclusion that the Act displaces OSH Act coverage only of those particular working conditions "with respect to which" another agency has exercised regulatory authority. 29 U.S.C. 653(b)(1).

The courts of appeals have been virtually unanimous in reaching that conclusion as well.[8] Indeed, although the Fifth Circuit reached a contrary conclusion in this case, see Pet. App. 6a, a quarter of a century ago, in a case concerning the railway industry, it also espoused the position that has been endorsed by all other courts of appeals to consider the question. See *Southern Pac. Transp. Co.*, 539 F.2d at 389-390.

2. Review of the legislative process that culminated in Section 4(b)(1)'s enactment reinforces the above reading of the statutory text. First, the drafting history shows that a federal agency with authority to

[8] See *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1245 (9th Cir. 1998); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1531 (11th Cir.); *Red Star Marine Servs., Inc.*, 739 F.2d at 778 (2d Cir.); *Columbia Gas of Pa., Inc.*, 643 F.3d at 915-916 (3d Cir.); *PBR, Inc.*, 643 F.2d at 896 (1st Cir.); *Baltimore & Ohio R.R.*, 548 F.2d at 1053-1054 (D.C. Cir.); *Southern Ry.*, 539 F.2d at 338 (4th Cir.).

regulate health and safety must exercise that authority before its actions will displace the OSH Act's coverage. Several bills under consideration would have precluded OSH Act enforcement whenever another agency "has" statutory authority. See S. 2788, 91st Cong., 1st Sess. § 15, at 32 (1969); H.R. 843, 91st Cong., 1st Sess. § 13, at 22 (1969); H.R. 4294, 91st Cong., 1st Sess. § 13, at 13 (1969); H.R. 13373, 91st Cong., 1st Sess. § 15, at 32 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 62, 620, 671, 710 (Comm. Print 1971) (*Leg. Hist.*). The versions reported in both the House and Senate, see S. 2193, 91st Cong., 2d Sess., as reported, § 4(b)(1), at 33-34 (1970), *reprinted in Leg. Hist.* 236-237; H.R. 16785, 91st Cong., 2d Sess. (1970), as reported, § 22(b), at 83 (1970), *reprinted in Leg. Hist.* 975, like the text that was ultimately enacted, however, precluded OSH Act enforcement only when another agency "exercise[s]" such authority. A colloquy on the House floor emphasized that the use of the word "exercise" was deliberate and was intended to make clear that "the mere existence of statutory authority" does not result in an exemption from OSH Act coverage. See *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 337 (4th Cir.) (quoting *Leg. Hist.* 1019), cert. denied, 429 U.S. 999 (1976); 116 Cong. Rec. 38,381 (1970).

The history surrounding Section 4(b)(1)'s enactment also shows that Congress rejected industry-wide exceptions from the OSH Act's coverage based on limited exercises of regulatory authority by other federal agencies. The bill initially passed by the House of Representatives would have provided such exceptions by preempting "working conditions of employees with respect to *whom*" other agencies exercise statutory



authority to prescribe or enforce standards or regulations affecting occupational safety or health. See H.R. 16785, *supra*, § 25(b) (1970) (emphasis added), *reprinted in Leg. Hist.* 1109. Congress, however, did not adopt the language in the House bill. Instead Congress chose the language in the Senate bill, which used "which" instead of "whom." See S. 2193, *supra*, § 4(b)(1), at 5, *reprinted in Leg. Hist.* 533. As the Senate Report explained, that language limits preemption to "*particular* working conditions regarding which another Federal agency exercises statutory authority." S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis added), *reprinted in Leg. Hist.* 162. The Conference Committee recognized the difference in the language between the House and Senate versions and chose the Senate language. See H.R. Conf. Rep. No. 1765, 91st Cong., 2d Sess. 32-33 (1970), *reprinted in Leg. Hist.* 1185-1186. Thus, "consideration of the way in which Congress arrived at the statutory language," *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198 (1974), confirms that exemptions from OSH Act coverage under Section 4(b)(1) depend on whether another federal agency has exercised statutory authority with respect to the "particular working conditions" at issue. S. Rep. No. 1282, *supra*, at 22, *reprinted in Leg. Hist.* 162.

3. In light of the statutory text and drafting history, the court of appeals erred in recognizing "an industry-wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters," Pet. App. 6a (quoting *Texaco, Inc.*, 720 F.2d at 826), including seamen serving on uninspected vessels, by virtue of the Coast Guard's regulation of some working conditions on certain vessels. The Coast Guard does have comprehensive statutory authority over the working conditions of seamen on *inspected* vessels. As recognized in

a 1983 Memorandum of Understanding (MOU) between the Coast Guard and OSHA, it has exercised that authority so as to displace OSH Act coverage of all working conditions of seamen on those vessels. See Pet. App. 63a (noting that the Coast Guard's "comprehensive standards and regulations" include "extensive specific regulations governing the working conditions of seamen aboard inspected vessels as well as ample general authority regulations to cover these seamen with respect to all other working conditions that are not addressed by the specific regulations"). With respect to the working conditions of employees on *uninspected* vessels, however, the Coast Guard does not have and has not exercised comprehensive authority. Therefore, the proper inquiry under Section 4(b)(1) is whether the Coast Guard has regulated the particular working conditions with respect to which OSHA seeks to enforce its own safety or health standards or has articulated a policy that those working conditions should not be regulated.

Section 4(b)(1)'s rule governing when other federal regulation displaces the OSH Act is similar to a rule that Congress and the courts have applied in certain contexts to determine when federal law preempts state law. Under that rule, the existence of federal regulatory authority in a certain field is not sufficient to occupy that entire field and displace all state regulation. But when federal authority is exercised over a particular subject within the field, state law is displaced with respect to that subject. The exercise of federal authority need not entail affirmative regulation; it can instead consist of a determination that no requirements concerning the subject are appropriate. But it must constitute an actual exercise of authority over the subject.



This Court has used this approach to preemption to determine whether and to what extent state law has been preempted under Title I of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. 1221 *et seq.* See *United States* v. *Locke*, 529 U.S. 89, 110 (2000) (relevant preemption inquiry under Title I of the PWSA is "whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all").[9] As the Court explained in *Locke*, this approach to preemption is appropriate when the federal statutory scheme reflects strong interests both in maintaining uniformity of regulation by the federal agency charged with oversight of a particular field and in preserving an important role for the residual powers of the States when the federal agency has not exercised its statutory authority. See *id.* at 108-109.

As we have explained, see pp. 16-17, *supra*, Section 4(b)(1) reflects an analogous confluence of interests. It is designed in part to avoid duplicative federal regu-

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[9] See also, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 352 (2000) (state law is generally preempted under the Federal Railroad Safety Act of 1970 when federal regulation "'cover[s]' the same subject matter"); *Bethlehem Steel Co.*, 330 U.S. at 774 (States are "permitted to use their police power in the interval" until a federal agency either acts affirmatively or decides that "no * * * regulation is appropriate," if the state regulation "relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment"); cf., *e.g.*, *Fidelity Fed. Sav. & Loan* v. *De La Cuesta*, 458 U.S. 141, 152-159 (1982) (regardless whether the Federal Home Loan Bank Board's regulations occupy the field of federal savings and loan regulation, the Board's regulation of the due-on-sale practices of federal savings and loan associations preempts state regulation of those practices because the Board intended its regulation on that subject to be exclusive).

lation of occupational safety and health. Thus, when a federal agency other than OSHA has authority to regulate an industry, including occupational safety and health in that industry, Section 4(b)(1) provides that the other agency's exercise of its specialized authority will prevail. But Section 4(b)(1) is also designed to give OSHA the role of overseeing worker safety and health and preventing gaps in worker protection. Therefore, consistent with the approach to preemption of state law in *Locke* and similar cases, Section 4(b)(1) provides that OSH Act coverage is not displaced unless the other agency has actually exercised its statutory authority either by imposing regulatory requirements with respect to the working conditions at issue or by determining that such requirements are not warranted.

**B. No Coast Guard regulations cover the working conditions in this case, and the Coast Guard has expressed no policy against imposing regulatory requirements**

Under Section 4(b)(1) properly construed, Coast Guard action has not displaced the OSH Act with respect to the working conditions involved in this case. The OSH Act does not define the term "working conditions," and the courts of appeals have utilized two somewhat divergent definitions. Under either definition, however, Coast Guard regulations do not cover the working conditions at issue here, and the Coast Guard has not articulated any policy that no regulatory requirements should be imposed.

1. The Secretary has long taken the view that "working conditions," as used in Section 4(b)(1), means the particular physical and environmental hazards encountered by an employee in the course of his or her job activities. See *Southern Ry.*, 539 F.2d at 339 (describing Secretary's interpretation); Pet. App. 56a-57a



(equating working conditions as used in Section 4(b)(1) with "particular hazards"). Several courts of appeals have resolved questions under Section 4(b)(1) using that understanding of "working conditions." See *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1530-1531 (11th Cir.); *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 778-780 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); cf. *Cearley* v. *General Am. Transp. Corp.*, 186 F.3d 887, 892 (8th Cir. 1999) (OSHA's safety regulations "may fill the gaps" in another agency's safety regulations "if, and only if, the [agency] has not exercised its statutory authority to prescribe or enforce standards or regulations affecting the relevant area of occupational safety or health"); *Southern Pac. Transp. Co.*, 539 F.2d at 391 (5th Cir.) (essentially adopting a hazard-based test but noting that "hazards" can sometimes be expressed as "a location (maintenance shop)"). Under a second definition, adopted by two courts of appeals, "working conditions" refers somewhat more broadly to "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry.*, 539 F.2d at 339 (4th Cir.); see also *Columbia Gas of Pa. Inc.*, 643 F.2d at 916 (3d Cir.).

Although resolution of the disagreement about the meaning of "working conditions" is not necessary to resolve this case, the hazard-based definition is correct. In isolation, the term "working conditions" might encompass a range of "'circumstances' or 'state of affairs' attendant to one's performance of a job." *Fort Stewart Schs.* v. *Federal Labor Relations Auth.*, 495 U.S. 641, 645 (1990). See *Webster's Third New International Dictionary* 473 (1969) (defining "conditions" as "attendant circumstances" or "existing state of affairs"). The

term's precise meaning as it is used in Section 4(b)(1) of the OSH Act, however, must be determined with reference to the statutory context in which the term appears. See, *e.g.*, *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 210-211 (1964) (looking to industrial practice and the purposes of the National Labor Relations Act to determine the meaning of "conditions of employment" under the NLRA); *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 35 (2d Cir.) (Friendly, J.) (interpreting "working conditions" that are subject to mediation under the Railway Labor Act in light of the purposes of that Act), cert. denied, 379 U.S. 817 (1964).

For example, this Court has concluded that, as the term "working conditions" is used in 5 U.S.C. 7103(a)(14), which concerns collective bargaining, it includes "'conditions of employment' in the sense of qualifications demanded of, or obligations imposed upon, employees." *Fort Stewart Schs.*, 495 U.S. at 646. The Court has also noted, however, that "working conditions" may be used as a "term[] of art" with a "more specific meaning in the language of industrial relations." *Corning Glass*, 417 U.S. at 201, 202 (interpreting the Equal Pay Act of 1963). When it is used in that sense, "working conditions" encompasses "surroundings," which include "the elements, such as toxic chemicals or fumes, regularly encountered by a worker," and "hazards," which include "the physical hazards regularly encountered." *Id.* at 202. As the Court noted in *Corning Glass*, "[t]his definition of working conditions is * * * well accepted across a wide range of American industry." *Id.* at 202 & n.21 (citing, *e.g.*, 2 United States Dep't of Labor, *Dictionary of Occupational Titles* 656 (3d ed. 1965) (defining working conditions to include factors such as whether the job is



performed indoors or outside; exposure to heat or cold; exposure to water, or other liquids, or humidity; exposure to noise and vibration; physical hazards; and exposure to fumes, odors and toxic conditions).[10]

As used in Section 4(b)(1) of the OSH Act, the term "working conditions" most naturally refers to occupational safety and health hazards that an employee encounters on the job. That definition is essentially the same as the "term of art" recognized in *Corning Glass*, because such hazards include both physical hazards and environmental hazards, such as toxic chemicals and fumes, which the Court in *Corning Glass* identified as "surroundings." 417 U.S. at 202.

Construing "working conditions" to mean occupational safety and health hazards is appropriate because the OSH Act in general, and Section 4(b)(1) in particular, address only those "working conditions" that "affect[] occupational safety or health." 29 U.S.C. 653(b)(1).[11] And, because Section 4(b)(1) addresses

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[10] In *Corning Glass*, the Court held that "working conditions," as used in the Equal Pay Act, does not include consideration of whether an employee works a day or night shift, although a lay person might assume that time of day worked is one aspect of a job's "working conditions." 417 U.S. at 202-203.

[11] See also, *e.g.*, 29 U.S.C. 651(b)(1) (OSH Act's purpose is to ensure "safe and healthful working conditions" "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions"); 29 U.S.C. 651(b)(2) ("employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions"); 29 U.S.C. 651(b)(4) (OSH Act builds on existing initiatives for providing "safe and healthful working conditions"); 29 U.S.C. 670(c) (education and training programs for preventing "unsafe or

"working conditions" that OSHA or another agency may regulate, it specifically concerns those conditions that may *adversely* affect worker health and safety. See *ibid.* See generally *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) (explaining that the words of a statute should be interpreted in a manner consistent with their neighbors to avoid giving the statute an unintended breadth). Conditions that may adversely affect occupational safety or health are hazards. See *Black's Law Dictionary* 719 (6th ed. 1990) (defining "hazard" as "[a] risk or peril"). Accordingly, the term "working conditions," as used in Section 4(b)(1), refers to occupational safety and health hazards.

The alternative interpretation—under which "working conditions" means "the environmental area in which an employee customarily goes about his daily tasks," *Southern Ry.*, 539 F.2d at 339—has several flaws. First, it is inconsistent with the ordinary meaning of the word "conditions." See p. 25, *supra*. An "area" is not a "condition." Instead, conditions (including those affecting occupational safety and health) exist within an area. Consistent with that ordinary understanding, the OSH Act distinguishes between "conditions" and "places of employment." See 29 U.S.C. 652(8) ("'occupational safety and health standard' means 'a standard which requires conditions * * * reasonably necessary or appropriate to provide safe or healthful employment and places of employment'").

Second, the area-based definition of "working conditions" is inconsistent with the statutory text in which

unhealthful working conditions"); 29 U.S.C. 670(d)(4)(C) (Supp. V 1999) (employer may obtain an exemption from a workplace inspection by establishing, among other things, procedures to achieve "safe and healthful working conditions").



those words appear. As we have explained, the use of the phrase "working conditions with respect to which" in Section 4(b)(1) indicates that the OSH Act is displaced only with respect to those "*particular* working conditions" over which the other agency has exercised its statutory authority. S. Rep. No. 1282, *supra*, at 22 (emphasis added). And the process by which Congress arrived at that phrase confirms that conclusion. See pp. 18-19, 20-21, *supra*.

Third, an area-based definition of "working conditions" is inconsistent with the OSH Act's purpose to provide comprehensive protection from occupational safety and health hazards because it results in significant gaps in worker protection. For example, another federal agency may have regulated one hazard in an area, such as fire or ventilation, but not regulated, or even considered, other hazards, such as noise, in the same area. See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586-587 (D.C. Cir. 1994) (noting the difference between the Federal Railroad Administration's regulation of some hazards on railroad bridges and OSHA's regulation of others); *Red Star Marine Servs., Inc.*, 739 F.2d at 779-780 (recognizing the difference between OSHA's regulation of noise and the Coast Guard's regulation of petroleum gas, ventilation requirements, backfire flame control, and fire extinguishers on a tugboat). If the OSH Act were displaced because of any regulation by another agency of any aspect of the workplace, workers would face significant numbers of unregulated hazards.

2. If this case is analyzed using the hazard-based interpretation of "working conditions," it is clear that the OSH Act has not been displaced by any exercise of Coast Guard authority. The working conditions at issue are the conditions faced by employees on an unin-

spected vessel engaged in oil drilling operations on inland waters—in particular, the risk of explosion caused by the presence of natural gas in the atmosphere of the vessel. The Coast Guard has not regulated the risk of explosion caused by the presence of natural gas on an uninspected drilling barge operating on inland waters, and it does not have statutory authority to do so. As we have explained, the Coast Guard's statutory authority to regulate uninspected vessels is limited to specific subjects. Coast Guard regulations for those vessels therefore cover only a limited range of health and safety hazards, and they do not address hazards relating to oil drilling operations on inland waters. See pp. 4-5, *supra*. Further, the Coast Guard has not made (and has no statutory authority to make) any determination that no standards or regulations should be adopted as a matter of policy with respect to the working conditions involved in this case. Thus, under the hazard-based definition of "working conditions" adopted by the Secretary, the Coast Guard has not exercised any authority to regulate the working conditions in this case so as to displace application of the OSH Act.

The OSH Act also would not be displaced even under the area-based definition of "working conditions." Courts using that definition have construed the relevant "area" narrowly, perhaps to avoid the gaps in worker protection that would arise if any regulation by another agency of any aspect of an employee's workplace were sufficient to displace all OSHA regulation in that area. Those courts limit the "area" that they regard as the relevant "working conditions" to that portion of the worksite that presents the relevant hazard. See, *e.g.*, *Pennsylvania Elec. Co.* v. *FMSHRC*, 969 F.2d 1501, 1504 (3d Cir. 1992) (relevant area is the point on a



conveyor belt where guards are required to prevent injury—"the 'environmental area,' that might pose a potential danger to [the employer's] workers"); *Columbia Gas of Pa., Inc.*, 636 F.2d at 918 (relevant "working conditions" are "the 'hot tap' of a pipeline transporting natural gas," the discrete area that poses a risk of fire or explosion); *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191, 1194 (4th Cir. 1982) (relevant area is the part of the passenger lounge entry into which and exit from which pose various risks).[12]

Using that approach, the relevant "area" in this case is the atmosphere of the *Mr. Beldon*, which exposed the employees on board to a risk of explosion from natural gas. The Coast Guard has not promulgated any regulations addressing the atmosphere of an uninspected barge operating on inland waters, such as the *Mr. Beldon*.[13] Nor has the Coast Guard articulated a policy

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[12] The Fourth Circuit also has concluded that the "area" test does not always apply in determining Section 4(b)(1) preemption. See *Reich* v. *Muth*, 34 F.3d 240, 243-244 (1994) (discussing holding in *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88, 91-93 (1980), that OSHA can regulate the working conditions of longshore workers on a ship even though the Coast Guard regulates the same conditions as they apply to seamen). In this case, however, the Fourth Circuit's exception to the area test for longshore workers would not apply, because the court of appeals determined that the employees on the *Mr. Beldon* were seamen. Pet. App. 4a; see also *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548, 554 (1997) (discussing test for seaman status).

[13] Coast Guard regulations address some hazards in the atmosphere of vessels (including uninspected vessels), facilities, and other units operating on the outer continental shelf. See 33 C.F.R. Ch. I, Subch. N (promulgated under authority of 43 U.S.C. 1333). Coast Guard regulations also address ventilation on certain other types of uninspected vessels. See 46 C.F.R. 25.40 (motorboats or motor vessels) (implementing 46 U.S.C. 4102(d)); 46 C.F.R. 28.340

that requirements should not be imposed for that area. Accordingly, the Coast Guard has not exercised any authority that would displace application of the OSH Act, even under an "environmental area" definition of "working conditions." See also *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1245-1246 (9th Cir. 1998) (finding it unnecessary to choose between the hazard-based and area-based definitions of "working conditions" because even under "the Third and Fourth Circuits' [area-based] definition, it is apparent that the Coast Guard regulation of uninspected vessels is not so pervasive as to preempt the Secretary's jurisdiction as to any particular portion of such vessels nor as to such vessels in whole").

**C. The Secretary's interpretation of Section 4(b)(1) best furthers the OSH Act's purpose and is entitled to deference**

For the reasons we have explained, the Secretary's interpretation of Section 4(b)(1) is the best reading of that provision. Under that interpretation, the Coast Guard has not exercised any authority that displaces application of the OSH Act in this case, and, therefore, the decision of the court of appeals should be reversed. To the extent that there is any ambiguity about the proper interpretation of Section 4(b)(1), however, the Secretary's interpretation best furthers the purpose of the OSH Act and is entitled to deference.

1. As described above, the OSH Act's fundamental purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful work-

(commercial fishing industry vessels) (implementing 46 U.S.C. 4502(a)(4)). See also 33 C.F.R. 175.201, 183.601-183.630 (addressing ventilation on recreational vessels) (promulgated under authority of 46 U.S.C. 4302).



ing conditions." 29 U.S.C. 651(b); see also *Martin*, 499 U.S. at 147 (OSH Act establishes "a comprehensive regulatory scheme"); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 12 (1980) (OSH Act is "prophylactic in nature" and designed "to prevent deaths or injuries from ever occurring"). The Secretary's interpretation of Section 4(b)(1) furthers the Act's central purpose by preventing the existence of gaps in worker protection. In contrast, the interpretation of Section 4(b)(1) adopted by the court of appeals would create significant gaps in coverage, because it would displace OSHA's regulation of working conditions even when the Coast Guard (or another federal agency) does not—and sometimes cannot—regulate those conditions.

Even if the court of appeals' interpretation were applied only to the working conditions of seamen on uninspected vessels, it would put at risk the safety and health of many thousands of employees. According to data maintained by the Coast Guard, approximately 68,000 vessels nationwide—including barges, fishing vessels, tugboats, towing vessels, and other commercial vessels—are classified as "documented" but "uninspected."[14] Coast Guard marine casualty reporting records show that an average of 100 deaths and 600

[14] To be eligible for documentation, a vessel must be at least five net tons and meet certain other statutory requirements. See 46 U.S.C. 2101(10) (definition); 46 U.S.C. 12102 (1994 & Supp. IV 1998) (requirements). To be subject to inspection, a vessel must fall into one of the categories listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998). Some vessels, such as fishing vessels smaller than five net tons, are neither inspected nor documented by the Coast Guard. As a result, the Coast Guard data understate the number of uninspected vessels.

injuries occur every year on uninspected vessels.[15] Thus, if there were an "industry-wide exemption [from the OSH Act] for seamen serving on vessels operating in navigable waters," Pet. App. 6a, thousands of employees on uninspected vessels would have no federal regulatory protection from serious threats to their occupational safety and health, except for the few Coast Guard rules that address a limited range of hazards on some of those vessels. See *Tidewater Pac., Inc.*, 160 F.3d at 1241 (holding that employees on a tugboat were protected by OSHA standards governing confined-space entry procedures, machine guarding, and blood-borne pathogen exposure, none of which was regulated by the Coast Guard); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1531 (noting that "no federal agency would have the authority to regulate the safety of crane equipment aboard uninspected vessels" if the OSH Act did not apply); *Red Star Marine Servs., Inc.*, 739 F.2d at 780 (explaining that, if the OSH Act did not apply, "neither OSHA nor the Coast Guard would exercise authority over the uninspected vessel fleet, to the detriment of those employees exposed to the hazard of excessive noise"); *Secretary of Labor* v. *Alaska Trawl Fisheries Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1701 (1992) (concluding that the OSH Act protects em-

[15] Those figures are based on Coast Guard records for fiscal years 1996 through 2000. The Coast Guard defines a reportable injury as one "that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties." 46 C.F.R. 4.05-1(a)(6). Not all marine casualties occur in circumstances under which the vessel is subject to OSH Act coverage. For example, if an accident occurs while a vessel is on the high seas, it is beyond the geographical scope of the OSH Act. See 29 U.S.C. 653(a).



ployees on "factory ships" used to clean, process, freeze, and package fish from hazards presented by those activities, which are not regulated by the Coast Guard).

If the rationale of the court of appeals were extended to permit industry-wide exemptions based on sporadic regulation by other federal agencies in other fields, employees in many other large industries, such as railroad and airline employees, would face similar gaps in protection. See, *e.g.*, *PBR, Inc.*, 643 F.2d at 893 (employee killed by an unguarded machine used to repair railroad tracks); *Southern Ry.*, 539 F.2d at 336 (employees working in a railroad repair shop). Reading Section 4(b)(1) to leave "thousands of workers * * * exposed to unregulated industrial hazards would * * * utterly frustrate the legislative purpose." *Id.* at 338; see also *Red Star Marine Servs., Inc.*, 739 F.2d at 780; *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976) (per curiam).

In contrast, the Secretary's interpretation of Section 4(b)(1) ensures the comprehensive coverage that Congress intended the OSH Act to provide. At the same time, the Secretary's reading of the Section gives full force to its specific purpose to prevent the inefficiencies that would result from duplicative regulation of the same hazards by multiple federal agencies. See *Reich* v. *Muth*, 34 F.3d 240, 243 (4th Cir. 1994); *Columbia Gas of Pa., Inc.*, 636 F.2d at 915; *American Petroleum Inst.* v. *OSHA*, 581 F.2d 493, 510 (5th Cir. 1978), aff'd on other grounds, 448 U.S. 607 (1980); *Organized Migrants in Cmty. Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975); 29 C.F.R. 1975.3(c). The Secretary's interpretation avoids that duplication because another federal agency will displace OSH Act coverage if it adopts standards or regulations governing the working

conditions at issue or articulates a policy determination that such requirements are not warranted.[16]

Accordingly, there is no merit to respondent's contentions (Br. in Opp. 21, 22, 25) that the government's approach is a "nook and cranny" theory. See also *Texaco, Inc.*, 720 F.2d at 826 n.1; *Southern Ry.*, 539 F.2d at 338. As we have explained, see p. 16, *supra*, OSH Act coverage of a *set* of working conditions is displaced if another agency has comprehensive statutory authority over those working conditions and has indicated that its exercise of that authority is sufficient. That is why OSHA and the Coast Guard agree that Coast Guard regulation *has* displaced OSH Act coverage of the working conditions of seamen on *inspected* vessels. See Pet. App. 63a. But OSHA and the Coast Guard also agree that the Coast Guard's limited

[16] When another federal agency promulgates a regulation that makes compliance with an OSHA regulation a physical impossibility, the other agency has thereby articulated a policy that the working conditions to which OSHA's regulation would otherwise apply should not be regulated, at least not in the manner called for by the OSHA regulation. See *U.S. Air, Inc., supra* (Federal Aviation Administration regulation requiring airport doors to be kept closed to prevent terrorism preempts OSHA regulation requiring doors to be kept open to allow escape in case of fire). Section 4(b)(1) does not authorize an OSHA regulation to override or to displace a safety or health regulation promulgated by another federal agency. We note, however, that Congress anticipated that Section 4(b)(1) might result in some residual uncertainty and duplication of enforcement efforts. See 29 U.S.C. 653(b)(3) (requiring Secretary to report to Congress "recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this chapter and other Federal laws"); *Baltimore & Ohio R.R.*, 548 F.2d at 1055. As we discuss *infra*, OSHA and other federal agencies have been able to work together to reduce uncertainty and duplication while ensuring that employees remain protected.



regulation of some working conditions on some uninspected vessels has not displaced OSH Act coverage of other working conditions on all of those vessels.

2. Permitting the court of appeals' decision to stand would interfere with long-standing, settled decisions regarding the lawful and most effective division of safety and health regulatory responsibilities between the Departments of Transportation and Labor. Those decisions are both workable and entitled to deference under the principles reflected in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), because they represent the views of the agency charged with administering and enforcing the OSH Act. See *Martin*, 499 U.S. at 147, 157.

With the consent and active cooperation of the Coast Guard, OSHA historically has enforced the OSH Act nationwide with respect to working conditions of employees on uninspected vessels (except in the occasional case in which the Coast Guard has a regulation applicable to uninspected vessels that addresses the same occupational safety or health hazard).[17] OSHA inspects such vessels in response to employee complaints, fatalities, and referrals, and OSHA inspectors often accom-

[17] The Coast Guard has repeatedly disclaimed comprehensive authority to regulate uninspected vessels. See *Tidewater Pac., Inc.*, 160 F.3d at 1241 (noting Coast Guard's amicus brief in which it "unequivocally disclaims comprehensive regulation of uninspected vessels generally, regulation of the cited conditions, and statutory authority to promulgate such regulations"); *Alaska Trawl*, 15 O.S.H. Cas. (BNA) at 1703 (noting Coast Guard's view, and Secretary's agreement, concerning Coast Guard's authority to regulate "traditional maritime safety items, not factory conditions").

pany Coast Guard personnel when they respond to marine casualties.[18]

The Secretary has expressed her understanding of Section 4(b)(1) on numerous occasions since shortly after enactment of the OSH Act. Most notably, the Secretary's interpretation of Section 4(b)(1) is embodied in three decades of citations for OSH Act violations that OSHA has issued to employers operating in industries regulated in part by other federal agencies. That history of citations is illustrated by the citations in this case and in the court of appeals decisions discussed above (see pp. 17-19 & notes 6-8 *supra*). The Secretary's interpretations "embodied in a citation * * * assume[] a form expressly provided for by Congress." *Martin*, 499 U.S. at 157. They are therefore "as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *Ibid.* Such formal exercises of delegated lawmaking power warrant deference if they are reasonable interpretations of an ambiguous statute. See *Chevron U.S.A. Inc.*, 467 U.S. at 842-843; *e.g.*, *In re Sealed Case*, 223 F.3d 775, 779-781 (D.C. Cir. 2000) (*Chevron* deference applies to agency's determination whether to bring enforcement action); *Reich* v. *D.M. Sabia Co.*, 90 F.3d 854, 859-860 (3d Cir. 1996) (deferring

[18] OSHA and the Coast Guard have coordinated their enforcement in other areas as well. See, *e.g.*, Pet. App. 62a-65a (MOU concerning inspected vessels); 62 Fed. Reg. 40,142, 40,154 (1997) ("OSHA coordinated with, and received support from," Coast Guard on OSHA's standards for handling cargo aboard vessels); 48 Fed. Reg. 30,886, 30,887 (1983) (OSHA "worked closely" with Coast Guard in developing OSHA standards for marine terminals); 42 Fed. Reg. 37,650, 37,654 (1977) (OSHA and Coast Guard coordinated in regulating commercial diving).



to Secretary's interpretation of OSH Act in light of *Chevron* and *Martin*).[19]

The Secretary has also expressed her views on the meaning of Section 4(b)(1) in a variety of other formats. In long-standing OSHA regulations, the Secretary has explained that, in enacting Section 4(b)(1), "Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection." 29 C.F.R. 1975.3(c); see also 29 C.F.R. 1975.1(b) (because the Act is "inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions," "standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority"). Consistent with that understanding, the Secretary has regulated the working conditions of employees in a working environment that was also subject to the Coast Guard's authority, to

[19] Giving *Chevron* deference to the Secretary's interpretations of the OSH Act made in enforcement proceedings is also consistent with the general rule that an agency receives such deference when it adjudicates a case. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995). Under the OSH Act, adjudication is the responsibility of the Occupational Safety and Health Review Commission, an agency that does not receive deference. See *Martin*, 499 U.S. at 151-154. A failure to defer to the Secretary's views expressed through enforcement of a citation would mean that no agency would receive deference when the Secretary interprets the OSH Act through enforcement of a citation and the Commission adjudicates the appropriateness of that interpretation.

the extent that those working conditions were not addressed by the Coast Guard's regulatory efforts. See 48 Fed. Reg. 30,886, 30,887 (1983) (discussing the Secretary's view of Section 4(b)(1) in promulgating standards to address hazards in the marine terminal environment).[20]

The Secretary of Labor also set forth her interpretation of Section 4(b)(1) in 1980 in a statutorily-mandated report concerning the Secretary's "recommendations for legislation to avoid unnecessary duplication and to achieve coordination between [the OSH Act] and other Federal laws." 29 U.S.C. 653(b)(3). The Secretary explained in the report that "industries as such are not preempted from OSHA; rather, the preemption rule of section 4(b)(1) applies only to particular hazards." Pet. App. 57a. In light of that interpretation, the Secretary recommended that Congress make no changes to Section 4(b)(1), and Congress did not revise the Section after receiving the Secretary's report. See *id.* at 61a. The Secretary's longstanding and consistently-held interpretation of Section 4(b)(1), as expressed in numerous citations, other enforcement efforts, regulations, and that report, is entitled to deference.

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[20] Other federal agencies also recognize that OSHA may retain authority over employees working in areas subject to the other agencies' regulations. See 59 Fed. Reg. 30,879, 30,880-30,881 (1994) (regulation by OSHA and Federal Railroad Administration of conditions on railroad bridges); *Association of Am. R.R.*, 38 F.3d at 586-587 (upholding that interpretation of Section 4(b)(1)); 57 Fed. Reg. 38,102, 38,123, 38,132 (1992) (EPA's protection of agricultural workers against pesticides in light of OSHA's field sanitation and hazard communication standards).



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

# Supreme Court of the United States

ELAINE L. CHAO, Secretary Of Labor,

*Petitioner,*

versus

MALLARD BAY DRILLING, INC.,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

## BRIEF OF RESPONDENT MALLARD BAY DRILLING, INC.

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## STATEMENT OF FACTS

Mallard owns and operates drilling rigs and barges for oil and gas exploration from its principal place of business in New Iberia, Louisiana. Mallard is owner and operator of the MR. BELDON, otherwise designated as Mallard Rig 52, an inland drilling barge, (Official No. 644167), measuring 190 feet in length and 50 feet in breadth and weighing approximately 1,482 tons with its home port in New Orleans, Louisiana. The MR. BELDON is a special purpose drilling barge and one of ten classified deep drilling barges owned by Mallard in the United States. It is a non-self propelled barge which is moved to location by tugboat.

The MR. BELDON was built in 1981 and construction plans were reviewed by the American Bureau of Shipping (ABS). Following initial construction, the rig was neither classed nor reinspected by the ABS. While Rig 52 received a Certificate of Documentation from the United States Coast Guard, it does not hold a Coast Guard Certificate of Inspection. Accordingly, while it is treated as an "uninspected" vessel by the United States Coast Guard, it still nonetheless comes under the jurisdiction of the Coast Guard.

While the MR. BELDON is classified as an uninspected drilling vessel, it nevertheless must comply with a plethora of Coast Guard regulations regarding navigation, safety, and working conditions of seamen. Douglas Halsey, a marine safety expert retained by Mallard and former Lt. Commander of the Coast Guard for over 20 years, performed a vessel inspection of the MR. BELDON. Halsey confirmed that the MR. BELDON's living quarters

met or exceeded Coast Guard requirements for structural fire protection, habitability, machinery spaces, electrical distribution system, fire prevention, life-saving, communication, abandon ship, training and safety programs. While the MR. BELDON was not manned by Coast Guard licensed personnel, all of its crew members were deemed to be "seamen" who were afforded protection under federal law as well as protection through the United States Coast Guard.

On June 16, 1997, the MR. BELDON was located at Little Bayou Pigeon, a navigable body of water in the territorial waters of the State of Louisiana, Parish of St. Martin. On that date, the MR. BELDON was performing oil and gas drilling operations pursuant to a drilling contract with Denbury Management, Inc., drill operator on State Lease 411.

The rig initially arrived on location on April 9, 1997; at no time prior to the incident in question did anyone from OSHA ever inquire or step foot on Rig 52 for inspection purposes or otherwise. The well was drilled without incident and reached a total depth of 13,430 feet on May 27, 1997. The Denbury 411 No. 19 well was in the final stages of completion when the blowout at issue occurred.

The Mallard crew was in the process of completing the well. Efforts were taken to displace drilling fluids with a calcium chloride solution. In order to accomplish this task, drilling mud was pumped out of the mud pits on the rig so that the tanks could be cleaned and used to mix the calcium chloride. In order to displace the drilling mud, the calcium chloride was to be pumped down the annulus and the returns would be taken up through the



drill pipe with a 25-foot stinger attached thereto. A TIW valve was attached at the top of the drill pipe. Since the stinger was eventually to be lowered into the packer assembly, thus causing the TIW valve to be lowered below the rotary, a joint of drill pipe was attached on top of the first TIW valve and the second TIW valve was placed on top of the joint of drill pipe. A piece of chicksan was then used to redirect the flow from the TIW valve down into a high pressure rubber hose which led to the rig's "possum belly." From the possum belly the mud was to be pumped into barges adjacent to the rig.

When the reverse circulation process was almost completed, rig personnel noted a sudden increase in flow and pressure. Pumps were turned off immediately and efforts were taken to close the lower TIW valve. Since this valve was approximately eight to ten feet above the drill floor, a ladder was initially used. When efforts to close the valve were unsuccessful, the drill string was lowered so that more men could attack the problem from the rig floor. The crew then discovered a leak in the area of the chicksan.

While all non-essential personnel were evacuated from the rig, the night crew remained and began making efforts to transfer mud back into the rig's mud tanks. During this process an explosion occurred which killed four seamen and injured two others.

On the morning of June 17, 1997, Captain John Gretz, Lt. Jason Neubauer and Lt. Commander Ken Carlite of the United States Coast Guard, Marine Safety Office in Morgan City, Louisiana, conducted a full investigation

into this casualty. In fact, the Coast Guard set up a command center in Butte LaRose and interviewed various Mallard employees located both on the MR. BELDON and at its main office in New Iberia, Louisiana. The United States Coast Guard spent approximately six months investigating this matter at which time it submitted an extensive blue ribbon post-casualty report.

No one questions the jurisdiction of the United States Coast Guard over this marine casualty. Chief Warrant Officer Gretz was specifically questioned regarding the Coast Guard's jurisdiction over the pertinent casualty and unequivocally testified that the Coast Guard is charged with, and did in fact discharge, its responsibility of investigating this "marine casualty,"; his testimony is illustrative:

Q: What was the purpose of your inspection?

A: The purpose was to investigate a marine casualty.

Q: What is a marine casualty?

A: A marine casualty covers a number of areas: fire, explosion, death, injury, among other criteria, yes, sir.

Q: Was there any special legislation or regulation of the United States Code that would give you the authority to conduct such an inspection?

A: Yes, this investigation was conducted under authority of 46 C.F.R. Part 4, as derived from authority in 46 U.S.C. § 6301.



Q: Are there certain conditions that designate whether or not a casualty is considered a marine casualty; a serious marine incident?

A: This one was designated as a serious marine incident. 46 C.F.R. 4.03-2 requires for a designation of a serious marine incident that one or more of the following occur: multiple injuries requiring medical attention, damage of property in excess of $100,000.00; and I believe there are other criteria in there also.

Q: Can you tell the court what was the scope of your investigation?

A: The scope of this investigation was to look at procedures, engineering and overall crew competency.

(TR p. 26).

Clearly then, the Coast Guard had jurisdiction over this casualty and in fact invoked that jurisdiction.

While Rig 52 was an uninspected vessel, it is plainly subject to Coast Guard authority. Simply put, an uninspected vessel is merely one that does not hold a United States Coast Guard issued Certificate of Inspection and is not inspected by a United States Coast Guard inspecting officer on a regularly scheduled basis. Nevertheless, the Coast Guard has issued regulations that specifically address uninspected vessels.

Chief Gretz testified at trial as follows:

Q: As a member of the United States Coast Guard, is the general goal the safety of life at sea?

A: Yes.

Q: Is that a fair statement?

A: Yes, sir.

Q: And "sea" that means any navigable waterway in which a vessel either flagged by the United States or within the United States territorial waters comes under the jurisdiction of the Coast Guard?

A: Yes.

Q: In this situation, Rig 52 was a vessel?

A: Yes, it was.

Q: It was a documented vessel?

A: Yes.

Q: It has an official number?

A: Yes.

Q: In order for it to conduct its operations, it was towed from one location to the ultimate location where this blowout occurred?

A: Yes.

Q: In connection with towing and moving it from one location to the other, it has to move on the navigable water of the United States?

A: Yes.

Q: And in connection with that, it has to have certain requirements such as navigational ways, lights?

A: Yes.

Q: Does it also have to have certain life-saving equipment such as life-saving rings?



A: Yes.

Q: Does it have to have firefighting equipment?

A: Yes.

Q: Does it have to have station bells?

A: Yes.

Q: Does it have to have other items that are promulgated by the United States Coast Guard that would apply to vessels?

A: Yes.

(TR pp. 42-44)

OSHA on the other hand and in particular its "investigator," Mike Spohrer, conducted no investigation into this casualty. To quote Mr. Spohrer he "stayed in the background" and did not personally interview any Mallard employees nor did he ever step foot aboard the MR. BELDON to conduct an actual inspection of the vessel itself. In short, Spohrer did nothing but "piggyback" the investigation performed by the United States Coast Guard. Just as important, Spohrer had neither the technical maritime training nor experience to perform a complete investigation of a serious marine casualty aboard a special purpose drilling vessel such as the MR. BELDON.

Spohrer gave his "interpretation" as to the jurisdiction of OSHA over this casualty:

Q: What is it?

A: *It's my directions on how to interpret the memorandum of understanding between the U.S. Coast Guard and OSHA.*

Q: And why was it necessary for you to review this document during the course of your inspection?

A: I wanted to be certain that I did have jurisdiction or that OSHA had jurisdiction in this case.

Q: Now, at the conclusion of your investigation, did you recommend the issuance of citations that are at issue in today's hearing?

A: Yes.

Q: And was your recommendation accepted by your area director?

A: Yes.

Q: *All of the violations that are cited in the items located in the citation, do those conditions relate to the working conditions aboard the rig or to navigational issues aboard the rig?*

A: *Working conditions.*

Q: Are there any OSHA regulations that require OSHA to assist a company in shutting down a well once a well is out of control that you're aware of?

A: Only the general duty clause; no specific standard.

Q: Maybe I'm not being clear. When you go out to do an inspection of a company like Mallard Bay in the event that there is a fire in a well, are you required to go out and fight that well fire as an OSHA inspector?

A: No.



## SUMMARY OF ARGUMENT

Mallard respectfully submits that there is no factual or legal basis for the imposition of OSHA jurisdiction in this case. In short, the Department of Labor has no jurisdiction to assess any citation or penalties against Mallard which arise out of a "marine casualty" aboard the MR. BELDON. The United States Coast Guard is the exclusive federal agency charged with the responsibility of regulating the "working conditions" of "seamen" on vessels – whether they be inspected or uninspected – on navigable waters. OSHA is preempted by the United States Coast Guard since this matter involves a marine casualty over which the United States Coast Guard has exclusive, pervasive jurisdiction and has in fact exercised that jurisdiction.

The Secretary spends much time asserting that the Coast Guard has abdicated its responsibility to regulate uninspected vessels; however, this bald assertion does not wash when viewed against the facts. In this case, the Coast Guard did in fact conduct an extensive six-month post casualty investigation. The Coast Guard did in fact board and inspect the MR. BELDON following this accident and interviewed numerous witnesses in connection with its investigation. OSHA, on the other hand, performed no independent investigation and its role, plain and simple, was to mirror the findings of the Coast Guard.

The Secretary attempts to skew the real issue in this case by focusing on the MR. BELDON's status as an "uninspected vessel;" however, whether the MR. BELDON was an inspected or uninspected vessel is much

ado about nothing. This is simply a distinction without a difference. The long and short of this matter is that the Coast Guard's jurisdiction over *all vessels on navigable waters* is complete and pervasive and is not diminished one iota by the characterization of a vessel as either inspected or uninspected. The United States Coast Guard does in fact have jurisdiction to board and investigate, seize and even sink uninspected vessels. With that said, there can be little question but that the Coast Guard's jurisdiction over uninspected vessels is pervasive rather than "minimal."

Section 4(b)(1) provides that the OSH Act does not apply to the working conditions of employees regulated by other federal agencies. Congress has delegated to the United States Coast Guard broad authority to "promulgate and enforce regulations for the protection of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2. Nevertheless, preemption under Section 4(b)(1) does not depend upon the extent to which the other federal agency, in this case the Coast Guard, has exercised its statutory authority.

The Secretary's argument that the Coast Guard must actually issue regulations pertaining to each and every working condition regarding seamen or issue a notice that it chooses to refrain from issuing such regulations, is an unworkable interpretation of Section 4(b)(1) and simply misses the mark. Under Section 4(b)(1) the Coast Guard may preempt OSHA's regulatory authority by issuing regulations that pertain to uninspected vessels as well as by undertaking enforcement activities of the same. The plain language of that section indicates that



this is all that the Coast Guard must do to preempt this regulatory field. There is no requirement that the Coast Guard engage in the proliferation of unnecessary and minute regulations which could conceivably affect each and every working condition of a seaman on an uninspected vessel.

Mallard also submits that the Coast Guard regulates the working conditions of seamen over their entire work place activity not simply each and every hazard or risk that a seaman could be conceivably exposed to while working on the rig. Mallard's area-based working environment definition rather than the Secretary's hazard-based definition of working conditions simply makes more sense and lends itself to uniform application throughout the maritime industry. The havoc that could be created by the adoption of the Secretary's definition of working conditions is painfully apparent.

Uninspected vessels will clearly be involved in navigation related marine casualties as defined in 46 C.F.R. § 4.03-1. Will OSHA respond and conduct investigations required by existing regulations? Will OSHA respond to oil spills involving uninspected vessels? If individuals are injured in a vessel collision, one inspected and one uninspected, is OSHA allowed to investigate or must it show deference to the United States Coast Guard? Would anyone, seamen included, benefit from the inclusion of OSHA in the operation/navigation segment of the marine industry? Mallard submits that Congress clearly could not have intended such an absurd and fragmented application for the protection of safety and life at sea.

The Department of Labor relies on the Memorandum of Understanding between it and the Coast Guard to support its jurisdiction in this case; however, this reliance is misplaced. The Coast Guard has statutory *congressional* authority over all vessels. The Coast Guard's acquiescence to OSHA's purported regulation of uninspected vessels cannot provide OSHA with regulatory authority in contravention of Congress. As the Fifth Circuit has previously noted, it is not permissible for federal agencies to shift and change their respective responsibilities between themselves but instead such agencies can only assert that jurisdiction which has been properly mandated by Congress. Thus, the Memorandum of Understanding between the Coast Guard and OSHA, irrespective of the reasons which gave birth to it, does not suffice to permit OSHA to assert its jurisdiction in this matter.

Mallard submits that the issue is not whether existing regulations are adequate or if uninspected vessels should be inspected; rather, the real issue is which federal agency is charged with responsibility for marine safety? What did Congress intend when it gave statutory authority to the Coast Guard? It is axiomatic that Congress intended for the United States Coast Guard to preserve life and safety at sea for all individuals working on vessels on navigable waters. If the United States Coast Guard chooses not to exercise that authority, then it is up to Congress – not competing federal agencies – to insure that the Coast Guard follows the mandate evaluated by Congress.

Finally, Mallard submits that OSHA's jurisdiction simply does not reach vessels. Had Congress intended for OSHA to assert jurisdiction over uninspected vessels in



state territorial waters it would have specifically enumerated the territorial waters of the states in the statute. Since Congress did not include the territorial seas as part of the jurisdiction of OSHA, it is improper for the Secretary to invoke its jurisdiction in this case.

## ARGUMENT

### I. The United States Coast Guard Has Been Granted The Statutory Authority And Has Exercised The Authority To Promulgate And Enforce Regulations For The Promotion of Safety and Health On The MR. BELDON And Therefore OSHA Does Not Apply To Those Working Conditions.

This case involves the applicability of OSHA land-based standards to the working conditions of seamen aboard a vessel regulated by the United States Coast Guard. Section 4(b)(1) of the Act states:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

The United States Coast Guard has been granted statutory authority by Congress to ensure the safety and health of seamen who work aboard vessels such as the MR. BELDON. Congress established the Coast Guard as part of the Department of Transportation in 1915, several decades before OSHA was even passed. 14 U.S.C. § 2.

Congress defined the Coast Guard's primary duties to include the following:

> The Coast Guard . . . shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department . . . 14 U.S.C. § 2.

**(a) Numerous Coast Guard Regulations Concerning Safety and Health Apply to The Working Conditions of the Seamen Aboard the MR. BELDON.**

Clearly, the living and working conditions of seamen aboard vessels are unique and differ substantially from those of employees in land-based work places. As aptly stated by this Court more than half a century ago, "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 38, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942). This "difference" necessitates that an agency with special maritime expertise, i.e., the Coast Guard, rather than a "jack of all trades and master of none," i.e., OSHA, be responsible for the safety of seamen.

The Fifth Circuit recognized that pursuant to this statutory grant of authority, the Coast Guard is the federal agency which exercises authority over the working conditions of seamen. *See Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th



Cir. 1983). Accordingly, the Fifth Circuit correctly held that Section 4(b)(1) precludes the application of OSHA standards to the "working conditions" of "seamen."

It is of no import whether the MR. BELDON is considered an inspected or uninspected vessel for purposes of OSHA jurisdiction. Simply put, the United States Coast Guard has exclusive responsibility for the safety and working conditions of seamen serving on vessels – both inspected and uninspected. Moreover, the United States Coast Guard has issued regulations and prescribed standards for safety on uninspected vessels in addition to inspected vessels. (A comprehensive list of such regulations is attached to the Amicus Brief of the Transportation Institute as Appendix 1.) Numerous sections of the United States Code govern and regulate "in minute detail the rights and duties of seamen." *Donovan v. Texaco Inc.*, 720 F.2d 825, 828 (5th Cir. 1983). In those sections Congress has delegated to the Coast Guard the authority and responsibility for ensuring the safety of seamen and regulating the health of seamen aboard vessels operating on navigable waters. Simply because the Coast Guard has chosen not to issue regulations for each and every conceivable contingency on an uninspected vessel does not mean that it has failed to exercise its authority.

It is undisputed that the Coast Guard has in fact issued regulations specifically tailored to uninspected vessels. It is further undisputed that under Section 4(b)(1) the Coast Guard may preempt OSHA's regulatory authority by exercising the statutory authority to prescribe such regulations. The plain language of the section indicates that this is all that the Coast Guard must do to preempt OSHA in this matter. The issue is not whether the Coast

Guard has issued sufficient regulations or has in fact undertaken enforcement activities consistent thereto. Rather the issues are whether Congress has given the Coast Guard congressional authority to issue such regulations – which it has – and whether the Coast Guard has undertaken to regulate this area – which it has. The Secretary's contention that the Coast Guard has either abdicated its responsibility through the Memorandum of Understanding or simply has not exercised its authority sufficiently misses the mark. As the Third Circuit has noted, the preemption inquiry "does not require us to look beyond the exercise of statutory authority by the agency; no language refers to the *quality or consistency* of the agency's exercise of statutory authority." *Pennsylvania Electric Co. v. Federal Mine Safety & Health Review Commission*, 969 F.2d 1501, 1505 (3d Cir. 1992). (emphasis in original)

Contrary to the Secretary's position, the Coast Guard regulates the working conditions aboard uninspected vessels as well as inspected vessels. The primary Coast Guard regulations applicable to seaman are contained in Chapter 1 of Title 46 of the Code of Federal Regulations. This chapter is broken down into twenty-one subchapters. Subchapter C is entitled "Uninspected Vessel" and sets forth a number of specific regulations protecting against a variety of hazards which may arise in the working environment of seamen aboard uninspected vessels. These regulations are promulgated pursuant to Chapter 41 of Title 46 of the United States Code, in which Congress specifically delegated to the Coast Guard the authority to promulgate and enforce regulations governing uninspected vessels. This chapter of the U.S. Code is



entitled "Uninspected Vessels Generally" and the statutes within the chapter make specific reference to safety equipment. *See* 46 U.S.C. § 4102.

The owner or operator of an uninspected vessel that does not comply with the statutory requirements or the Coast Guard regulations applicable to uninspected vessels may be subject to civil penalties. Moreover, the Coast Guard can actually seize the vessel to satisfy the penalties. *See* 46 U.S.C. § 4106 ("the vessel also is liable *in rem* for the penalty"). Subchapter C of the Coast Guard regulations includes specific regulations on numerous safety and health concerns applicable to uninspected vessels. In fact, contrary to its decision in this case, the Commission recognized over a decade ago that:

> Among the subjects regulated are navigation; ventilation; fire protection equipment; life preservers and other life-saving equipment; the design, construction and testing of boilers and machinery; liquified petroleum gas; back fire flame arresters for gasoline engines; safety orientation and emergency instructions; and pilot ladders.

*Dillingham Tug & Barge Corp.*, 10 OSH Cas. BNA 1859, 1861 (No. 77-4143) 1982. This subchapter on uninspected vessels specifically states that the Coast Guard shall have a marine inspector to ensure that the regulations are adhered to and that the working conditions aboard uninspected vessels are safe. *See* 46 C.F.R. § 24. 10-15.

The Secretary's position in this case is based on an erroneous interpretation regarding the extent of the Coast Guard's authority over inspected vessels. The Secretary represents to this Court that the Coast Guard's regulation

of inspected vessels is minimal; however, the Secretary's representation is incorrect.

Clearly the Coast Guard's authority is not limited to one chapter of the United States Code dealing specifically with uninspected vessels. As stated earlier, 14 U.S.C. § 2 delegates to the Coast Guard the general authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." This general grant of authority is much broader and *includes* safety issues on navigable waters, regardless of the type of vessel. *See Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 2658-59 (1982) (admiralty and maritime rules must apply on navigable waters regardless of the type of vessel involved).

Indeed, many other Coast Guard regulations outside the chapter entitled "Uninspected Vessels" govern the working conditions of seamen aboard uninspected vessels. The obvious reason these regulations are not included in the specific subchapter entitled "Uninspected Vessels" is because they apply to other types of vessels as well. Much like OSHA regulations, these regulations include safety standards and training requirements.

While the statutes and regulations discussed above are intended to prevent injuries aboard uninspected vessels, the Coast Guard has also promulgated regulations for investigating accidents and injuries on vessels when they do occur so that remedial action can be taken if necessary to safeguard against future accidents and injuries. All injuries, including deaths, which may occur on a vessel must be reported to the Coast Guard as required



by 46 U.S.C. §§ 6301-6307. The Coast Guard has promulgated extensive regulations pursuant to these statutes for the reporting and investigation of virtually all marine accidents. *See* 46 C.F.R. Part 4. These regulations apply to "any casualty or accident involving *any vessel* other than public vessels if such casualty or accident occurs upon the navigable waters of the United States." 46 C.F.R. § 4.03-1(a) (emphasis added). Thus, these regulations clearly apply – and even the Secretary concedes – to a privately owned uninspected vessel such as the MR. BELDON.

The Secretary asserts in its brief that one of its goals is to avoid "duplication of effort;" however, the duplication of effort on the part of the Coast Guard and OSHA in the present case is obvious. The Secretary's position is also inconsistent with the legislative history surrounding the enactment of the OSH Act:

> The Committee recognizes the need to insure employers that they will not be subject to unnecessary or duplicative record-keeping requests and has specifically stated this intent in Section 8(d). To that end, the Committee intends that, wherever possible, reporting requirements should be satisfied by having an employer report relevant data only to one governmental agency and that other governmental agencies, if any, such then acquire their information from the original agency.

Legislative History, Public Law 91-596; Senate Committee on Labor and Public Welfare, 92nd Congress, 1st Sessions, Legislative History of the Occupational Safety and Health Act of 1970.

Moreover, these Coast Guard regulations require the reporting of a marine accident involving an uninspected vessel even when the accident results in no injuries. The regulations clearly specify that they cover *any* accident involving a vessel which *caused* damage "which might affect or impair the seaworthiness of the vessel." 46 C.F.R. § 4.03-1(b). In contrast, OSHA regulations require that employers keep a log of only "recordable" injuries (29 C.F.R. § 1904.2) and that only very serious accidents be reported. (29 C.F.R. § 1904.8). Thus, the Coast Guard regulations applicable to the reporting of accidents involving uninspected vessels are again more protective than OSHA regulations. Indeed, contrary to its decision in this case, the OSHA Review Commission fully recognized in its *Dillingham* decision that many other Coast Guard regulations, outside those in the chapter entitled "Uninspected Vessels," apply to the working conditions of seamen on uninspected vessels. After discussing the safety regulations which pertain particularly to uninspected vessels, the Commission reasoned:

> In addition, various provisions of other subchapters, such as subchapter P – entitled "Manning of Vessels" – apply to uninspected vessels as well as other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels, as illustrated by the Coast Guard investigation that followed the accident involved in this case. *See* 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. *Dillingham Tug & Barge Corp.* 10 BNA OSHC at 1861.



Indeed, the OSHA Review Commission recognized almost twenty years ago that the distinction between inspected and uninspected vessels makes no difference whatsoever under Section 4(b)(1) of the Act. In *Dillingham* the Commission noted that "the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case." 10 *Dillingham*, BNA OSHC at 1861 n.6. Of course, there is no evidence whatsoever that the Coast Guard's authority or regulations have been diminished in any way since *Dillingham* was decided.

The Fifth Circuit in *Donovan* went a step further to specifically reject the Secretary's contention that preemption under Section 4(b)(1) only applies if the Coast Guard has the specific regulation comparable to the OSHA regulation at issue. *Donovan*, 720 F.2d at 826-827. The Court reasoned that the Secretary's interpretation of Section 4(b)(1) is clearly contrary to Congressional intent:

> Section 4(b)(1) evidences a general Congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise. Congress having declared against them in this instance it is not for us to disagree.

*Donovan*, at 827. The Court further explained:

> Section after section of the United States Code governs and regulates in minute detail the rights and duties of seamen, down to the form of shipping articles to be signed by them and the contents of their daily diet.

720 F.2d at 828.

The Secretary's erroneous interpretation is apparently based on the term "uninspected vessels" which is somewhat of a misnomer. Presumably, the phrase "uninspected vessel" was used simply because those vessels are not required to be inspected on a definite schedule as are those which are classified "inspected vessels." 46 U.S.C. § 2101(43) defines an uninspected vessel as "a vessel not subject to inspection under § 3301 of this title that is not a recreational vessel." This does not mean however that "uninspected vessels" are not subject to Coast Guard inspections or regulations; instead, it simply means that they are not subject to Coast Guard inspections on a regularly-scheduled basis.

Indeed, the Coast Guard's treatment of uninspected vessels is quite similar to the Secretary's inspections of ordinary workplaces. The Secretary generally inspects workplaces following accidents, based on an employee complaint or on a random periodic basis. Similarly, uninspected vessels are subject to Coast Guard inspections following a marine accident, pursuant to a complaint that a particular condition on a vessel is unsafe or unseaworthy and on random periodic bases. Thus, the Coast Guard's regulation of the working conditions of seamen



on uninspected vessels is quite similar to OSHA's regulation of ordinary workplaces.

Undoubtedly the Secretary believes that she has exercised her authority to regulate the working conditions of ordinary work places even though she does not conduct regularly scheduled inspections of each and every work place. She cannot now credibly contend that the Coast Guard has not exercised its authority when it regulates uninspected vessels in much the same manner. Furthermore, the Coast Guard, not OSHA, has the particular expertise to promulgate and enforce safety regulations for seamen. Mallard respectively submits that OSHA's entry into marine casualties would only confuse and unnecessarily complicate matters for marine employers. It simply belies common sense, and Congress clearly could not have intended for two separate federal agencies to simultaneously conduct investigations into the "working conditions" of seamen. The waste of time and resources for both private industry and government is patently obvious.

Mallard respectfully submits that this Court should adopt the rationale espoused in the Fifth Circuit. *Clary v. ODECO, supra*, is the leading Fifth Circuit case to discuss the Coast Guard's preemption of OSHA jurisdiction with respect to the "working conditions" of "seamen" working on vessels in navigable waters. In *Clary*, the plaintiff-roustabout suffered a knee injury on a submersible drilling vessel when he tripped over a retaining wall on a rig. Plaintiff specifically alleged that it was a violation of OSHA regulations not to have the retaining wall upon which he tripped color coded yellow as to make it more visible. The trial court, however, refused to allow plaintiff

to introduce into evidence OSHA regulations pertaining to color coding on the grounds that such regulations did not apply to vessels in navigation. *Clary v. ODECO*, 429 F.Supp. 905 (W.D.La. 1977).

In affirming the decision of the trial court, the Fifth Circuit articulated three persuasive reasons for refusing to allow OSHA regulations proffered by plaintiff into evidence. *Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980). First, it cites Section 4(b)(1) of the OSH Act and notes:

> The Coast Guard is a federal agency exercising statutory authority over the working conditions of seamen. Coast Guard regulations cover, among other things, standards governing the safety and health of persons working on vessels.

*Id.* at 1121.

Second, the *Clary* court emphasized that the OSHA commission has "disclaimed an intention to promulgate standards applicable to seamen," and has consistently conceded jurisdiction over the safety and health of seamen to the Coast Guard. Finally, the Court noted that the regulations proffered by plaintiff simply did not apply to a "special purpose drilling vessel in navigation." *See id.* at 1122.

Like the plaintiff in *Clary*, crew members aboard the MR. BELDON are seamen, not longshoremen. Like the plaintiff in *Clary*, the crew members aboard the MR. BELDON were assigned to a "special purpose drilling vessel." Like the plaintiff in *Clary*, the United States Coast Guard, not the Department of Labor, is the federal agency charged with responsibility for the safety and working conditions of seamen aboard the MR. BELDON.



The Secretary argues that her interpretation of the Act together with Commission precedent should be given preference in determining its jurisdiction. However, to say that the Commission itself has not been consistent on this issue is a mild understatement. In *Puget Sound Tug & Barge*, 9 OSH Cas. BNA 1764, 1981 WL 18907 (OSHRC April 30, 1981), the Commission held that Coast Guard regulation preempted the OSH Act as to vessels in navigable waters only to the extent that the Coast Guard regulated specific working conditions. However, in *Dillingham Tug & Barge Corp.*, 10 OSH Cas. BNA 1859, 1982 WL 22639 (OSHRC July 29, 1982), the Commission overruled *Puget Sound* and held that Coast Guard regulation of uninspected vessels was so pervasive that it entirely preempted OSHA regulation, i.e., a virtual industry exemption. This interpretation of Section 4(b)(1) avoided the "nook and cranny" approach coined by the Fifth Circuit which would allow OSHA regulation over every "working condition" not specifically regulated by the Coast Guard. Then in another turnabout in *Alaska Trawl Fisheries*, 15 OSH Cas. BNA 1699, 1992 WL 155480 (OSHRC June 18, 1992), the Commission dismissed the *Dillingham Industry* exemptions as *dicta*. Mallard submits that the jurisdiction of the Coast Guard, vis-a-vis OSHA should not depend on which way the wind blows when the Commission meets on a certain case but rather should be mandated by Congressional directives.

At trial of the case *sub judice*, OSHA's representative, Mike Spohrer, was questioned regarding the purpose of OSHA's involvement in this matter. Spohrer testified that

his investigation, like that of the Coast Guard, centered on the "working conditions" of the Mallard crew members. This is exactly what Congress has prescribed the United States Coast Guard to do in all instances! Spohrer's testimony is unequivocal:

> Q: Why was it necessary for you to review this [Memorandum of Understanding] during the course of your inspection?
>
> A: I wanted to be certain that I did have jurisdiction or that OSHA had jurisdiction in this case.
>
> Q: Now at the conclusion of your investigation, did you recommend the issuance of the citations that are at issue in today's hearing?
>
> A: Yes.
>
> Q: And was your recommendations accepted by your area director?
>
> A: Yes.
>
> Q: *All of the violations that are cited in the items located in the citation, do those conditions relate to the working conditions aboard the rig or to the navigational issues aboard the rig?*
>
> A: *Working conditions.* (emphasis added)

(TR 70-71).

Suffice it to say, the above testimony completely contradicts the Secretary that her "interpretation is also fully consistent with Section 4(b)(1)'s goal of preventing OSHA and other federal agencies from regulating the same health and safety conditions." (Page 13 of Petitioner's Brief.)



Mallard respectfully submits that Fifth Circuit rationale is compelling. The United States Coast Guard, not OSHA, is charged with the responsibility for regulating and prescribing standards for the "working conditions" of seamen serving aboard vessels on navigable waters. The Coast Guard, and not OSHA, has this special expertise in maritime casualties. The Coast Guard's jurisdiction preempts not only OSHA but every other federal agency which would otherwise attempt to assert jurisdiction over a marine casualty.

The Fifth Circuit in *Donovan*, citing *Secretary of Labor v. Dillingham Tug & Barge Corp.*, 10 OSH Cas. BNA 1859, 1982 WL 27639 (OSHRC July 29, 1982), noted that the Occupational Safety & Health Review Commission has itself concluded that OSHA has no applicability to the working conditions of seamen. Both the Commission and the Fifth Circuit recognized that 29 U.S.C. § 653(b)(1) "creates – in view of the Coast Guard's comprehensive regulation and supervision of seamen's working conditions – an industry-wide exemption for seamen serving on vessels operating on navigable waters." *Donovan*, 720 F.2d at 826.

The *Donovan* Court further opined that the regulatory authority of OSHA is completely abrogated for a particular industry if another federal agency exercises "general and pervasive" regulation of that industry. *Id.* at 826. The court concluded that the Coast Guard's regulation of vessels and seamen thus displaces OSHA coverage as to the safety and health of persons working on vessels. *Id.* at 826.

Little need be said regarding the Secretary's claim that the Memorandum of Understanding (*See* Appendix

F) shifted responsibilities for the working conditions of seamen from the United States Coast Guard to OSHA. In short, the Memorandum of Understanding is not a congressional pronouncement; rather, it is an informal memorandum between two federal agencies. Congress is the only entity which can shift responsibility from the United States Coast Guard to another federal agency. Until such time that Congress enacts legislation which does shift responsibility for the working conditions of seamen aboard uninspected vessels from the Coast Guard to OSHA, neither the Commander of the United States Coast Guard nor the Director for OSHA is at liberty to legislate responsibilities among themselves. *See Donovan v. Texaco, Inc.*, 720 F.2d 825, 827-28, n.3 (5th Cir. 1983), in which the Fifth Circuit made it quite clear to the Secretary and the Coast Guard that they are not authorized to overrule Congress' delegation of authority by shifting responsibilities for assuring the safe working conditions of seamen, stating: "It is not for modalities of the federal power to trade functions between themselves in perpetuity by agreement; the will of Congress must control." *Id.*

The United States Court of Appeals for the Fourth Circuit has likewise adopted the rationale of the Fifth Circuit. In *Taylor v. Moore-McCormick Lines, Inc.*, 621 F.2d 88, 92-93 (4th Cir. 1980), the Court stated:

> In summary, we think that Section 2, 14 U.S.C. makes it quite clear what is the proper delineation of responsibility between the Coast Guard and the Secretary of Labor in this area: The Coast Guard has responsibility for the safety of "seamen" under regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of



> longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive. *Id.* at 92-93.

While other circuits have reached a contrary result, *see In Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), *cert. den.*, 107 S.Ct. 271 (1986); *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. den.*, 105 S.Ct. 1355 (1985), these decisions are premised on the erroneous assumption that the Coast Guard has minimal responsibility for regulating safety on board uninspected vessels, and they completely ignore the Coast Guard's general grant of authority under 14 U.S.C. § 2 and the extensive regulations outside the sub-chapter entitled, "Uninspected Vessels."

### (b) The Phrase "Working Conditions of Employees" Means the General Work Site In Which Employees Perform Their Daily Task.

The "nook and cranny" interpretation of Section 4(b)(1) ignores the meaning of the phrase "working conditions of employees." According to the "nook and cranny" theory advanced by the Secretary, each and every OSHA regulation and standard would create a different working condition within the meaning of the jurisdictional statute. This interpretation is simply nonsensical.

The phrase "working conditions of employees" has been interpreted by the courts to mean the general area or work site in which employees perform their daily tasks. *See United Entergy Services, Inc. v. Federal Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994)

(holding that power plant located next to and operating in connection with coal mine constituted "working conditions" within the meaning of Section 4(b)(1)); *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 916-17 (3d Cir. 1980) (defining "working conditions" as being "the discrete work site at a trench"); *Marshall v. Nichols*, 486 F.Supp. 615, 619 (E.D. Tex. 1980), reversed in part on other grounds; *Donovan v. Nichols*, 646 F.2d 190 (5th Cir. 1981) (holding that the entire offshore platform constituted the "working conditions for OSHA jurisdictional purposes").

After recognizing that the term "working conditions" under Section 4(b)(1) refers to the general environmental area or work place in which employees perform their daily tasks, the courts uniformly hold that further analysis into the other agencies' enforcement activities or regulations is inappropriate. For example, the United States Court of Appeals for the Third Circuit has held that the term "working conditions" within the meaning of Section 4(b)(1) included an entire plant involved in the handling and processing of coal. The court went on to find that OSHA regulations were preempted as to the entire plant, reasoning as follows:

> The operative language [of Section 4(b)(1)] shows that the exercise of statutory authority by an agency triggers the preemption of OSHA. The statute does not require us to look beyond the exercise of statutory authority by the agency; no language refers to the quality or consistency of the agency's exercise of statutory authority.



*Pennsylvania Electric Co. v. Federal Mine Safety & Health Review Comm.*, 969 F.2d 1501, 1505 (3d Cir. 1992).

The Fourth Circuit has interpreted OSHA jurisdiction under Section 4(b)(1) the same, reasoning:

> Under Section 4(b)(1), MSHA may preempt OSHA's regulatory authority by "exercising statutory authority to prescribe . . . regulations affecting" the area at issue. The plain language of that section indicates that this is all that MSHA must do to preempt this regulatory field.

*United Entergy Services*, 35 F.3d at 971.

Contrary to this interpretation of "working conditions" under Section 4(b)(1), the Secretary in the present case errs by arguing that OSHA regulations can only be preempted as to the working conditions aboard an uninspected vessel if the Coast Guard has a substantially similar or "redundant" regulation addressing the exact same hazard and with the exact same intent. Clearly, this interpretation reads out of the jurisdictional statute entirely the term "working conditions." Applying the proper definition to the term "working conditions" in this case requires that the Court deem the general environmental area or work place at issue here as the entire vessel, not each piece of machinery, room, practice and procedure implemented on the vessel.

It is not far-fetched to state that allowing OSHA to regulate the working conditions of seamen on uninspected vessels on navigable waters on the basis that a particular working condition, i.e., in this case the risk of explosion due to the presence of natural gas, has not been expressly addressed by Coast Guard would lead to

wholly inconsistent assessments by OSHA inspectors who utilize different and varying "interpretive techniques" when making a jurisdictional decision. Vessel owners also would be burdened by attempting to ascertain the delineation of responsibility between the Coast Guard and OSHA as vessels travel in and out of state territorial waters. The lack of maritime uniformity on this issue would only hamper, not enhance, maritime commerce.

Similar to this more realistic interpretation of "working conditions" the United States Court of Appeals for the District of Columbia has reasoned that preemption under Section 4(b)(1) of the Act may apply to "a class of workers." *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975). Even if the "working conditions" in this case did not include the entire vessel, the class of workers at issue are seamen. Courts have noted that the relationship between a master and seaman is unique and "entirely different from that of employer to employee on land." *Donovan*, 720 F.2d at 828, quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 62 S.Ct. 886, 890 (1941). In analyzing the same jurisdictional issue under Section 4(b)(1) of the Act, the Fifth Circuit reasoned that because of this unique relationship OSHA regulations must give way when sought to be applied to the working conditions of seamen aboard vessels in navigation. 720 F.2d at 828-29.[1] Significantly, there is no evidence that any persons other than seamen was exposed to

[1] See also the Commission's reasoning in *Dillingham*: "This case involves an alleged hazard to a seaman arising out of activities aboard a vessel operating on navigable waters. The Coast Guard, *an agency with special expertise in maritime hazards* has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. 10 OSH Cas. BNA at 1862 (emphasis added).



**the alleged hazards for which the citations in this case were issued.**

**In short, the clear wording of Section 4(b)(1) states that if another federal agency has exercised statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health in some working environments, then OSHA standards and regulations do not apply. It is up to that federal agency which has been empowered by Congress to regulate those working conditions to decide what rules and regulations are needed to insure the health and safety of the employees. Thus, the Secretary cannot usurp authority to regulate these vessels; it must be left to the federal agency which is given the responsibility of dealing with that working environment.**

The Secretary's position that seamen can only be adequately protected through her "nook and cranny" interpretation of Section 4(b)(1) is also belied by her own enforcement activities. Simply because there may not be a specific regulation governing every piece of equipment aboard a vessel does not mean that the working conditions of seamen are not adequately protected and regulated.

The duty to provide a seaworthy vessel for seamen is much like the general duty clause imposed by OSHA on

land-based employers under 29 U.S.C. § 654(a)(1). The Secretary has never hesitated to investigate and issue citations to employers under the general duty clause even though a specific OSHA regulation has not been violated. *See, e.g., Secretary of Labor v. Morrison-Knudsen/Younkers Contracting Co.*, 16 OSCH (BNA) 1105, 1120-21 (No. 88-572, 1993); *Secretary of Labor v. Trans-Texas Well Service, Inc., d/b/a Trans-Oklahoma*, 15 OSCH (BNA) 2219, 2220 (No. 91-0391, 1992).

Indeed, the Secretary's position in this regard is hypocritical. In *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440 (9th Cir. 1994), *cert. den.*, 115 S.Ct. 1355 (1995), the Secretary came before the Ninth Circuit to enforce its investigative and subpoena power under the general duties clause of OSHA, even though there was no specific OSHA regulation concerning the alleged workplace hazards at issue. The Secretary argued that its authority under the Act did not depend upon the existence of a regulation governing specific workplace hazards. The Court agreed finding that the Secretary's authority under the Act is not "a series of unconnected stars in space, in between no standards govern and no investigation is proper. To the contrary, the Act consists of a general duty clause augmented in particular areas by specific regulations." 32 F.3d at 445.

The Secretary cannot credibly argue that her authority is broader than the specific regulations she promulgates while maintaining that other federal agencies such as the Coast Guard are limited in their authority and can only act if they have a specific regulation governing specific hazards. As previously mentioned, the Coast Guard has been empowered by Congress to "promulgate



**and enforce regulations for the promotion of safety of life and property on and under the high seas and water subject to the jurisdiction of the United States." 14 U.S.C. § 2. The Coast Guard has exercised that authority. If the Coast Guard has not been diligent in fulfilling its responsibilities that is an issue to be addressed by Congress. It is not within the Secretary's province to make that determination nor is it even an issue in connection with the clear language of Section 4(b)(1) of the Act.**

## II. An Uninspected Vessel Which Operates in U.S. Territorial Waters Is Not A "Work Place" Within The Meaning of Section 4(a) of the Act, 29 U.S.C. § 653(a).

**A plain reading of the scope of the OSH Act does not extend its reach to include vessels. Section 4(a) imposes geographic restrictions on OSHA's applicability. This section specifically limits the applicability of OSHA standards and regulations to work places within one of the 50 states and certain enumerated territories of the United States. 29 U.S.C. § 653(a). As such, the Fifth Circuit has previously held that a vessel is not such a "work place."** *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983).

**(a) The Navigable Waters of the United States Are Not Listed As One of the U.S. Territories Covered By OSHA In Section 4(a) And They Are Not Part of the State.**

The MR. BELDON was within the territorial waters of the United States at the time of the casualty in question; however, the territorial waters of the United States is not one of the enumerated U.S. territories listed in Section 4(a) of the Act.

Beginning around the 1930's the federal government and the coastal states engaged in a series of disputes over their respective rights to oil, gas and other natural resources extracted from offshore submerged lands. The history of these disputes is described in detail in this Court's seminal decision in *United States v. States of Louisiana, Texas, Mississippi, Alabama, and Florida*, 363 U.S. 1, 80 S.Ct. 961 (1960).

This ongoing dispute over the mineral rights to offshore submerged lands eventually led to the passage of the Submerged Lands Act of 1953. This Court described the four purposes of the Submerged Lands Act as follows:

> (1) To relinquish to the state the entire interest of the United States and the *lands beneath navigable waters within state boundaries;*
>
> (2) To define that area in terms of state boundaries as they existed at the time a particular state became a member of the union or approved by Congress, not to exceed seaward from the coast of any state more than three marine leagues in the Gulf of Mexico or more than three geographic miles in the Atlantic and Pacific Oceans;



> (3) To confirm to each state a seaward boundary of three geographic miles; and
>
> (4) *To reserve to the United States all constitutional powers of regulation and control over the territorial waters for purposes of commerce, navigation, national defense, and international affairs.*

*See* 363 U.S. at 8-10, 80 S.Ct. at 967-69.

**A careful reading of this Court's decision and the Submerged Lands Act demonstrates that the dispute over this "three mile territory" involved the seabed or submerged lands," not the water itself. In its decision, this court stated:**

> **The controversy centered primarily on the ownership of the oil rich *submerged lands* off the Coast of California.**

363 U.S. at 17, 80 S.Ct. at 972 (emphasis added).

In fact, the very title of the Act suggests that the federal grant to the states was of the "submerged lands" not the water.

The ultimate result was that the states were granted the sea bottoms extending three miles out from their coast. 43 U.S.C. § 1312. However, the Submerged Lands Act specifically preserved the federal government's primary or "paramount" authority to the waters above those sea beds, i.e., the territorial waters. Section 6 of the Submerged Lands Act makes it clear that the states acquire ownership rights to the submerged lands and the natural resources that were extracted from the submerged lands but that the federal government retained paramount

authority with regard to "navigation, regulation and control of the navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs." 43 U.S.C. § 1314(a).

That the waters remain primarily federal territory is further supported by the Coast Guard regulations defining the territorial seas. 33 C.F.R. § 2.05-25(a) states:

> With respect to the United States, *territorial seas* means the waters within the belt, three nautical miles wide that is adjacent to its coast and seaward of the territorial sea base line.

(emphasis in original)

33 C.F.R. § 2.05-25(a) states that these territorial seas are considered the "navigable waters of the United States." And the regulations go on to state quite clearly that the navigable waters of the United States are subject to the jurisdiction of the federal government. 33 C.F.R. § 2.05-30.

As mentioned, the Submerged Lands Act specifically states that the federal government retains paramount authority over the "navigable waters for the constitutional purposes of commerce." 43 U.S.C. § 1314(a). Significantly, the OSH Act was passed pursuant to Congress' authority under the Commerce Clause of the Constitution. *See* 29 U.S.C. § 651(a). Since the territorial waters of the United States are within the primary control of the federal government for purposes of commerce and since the OSH Act was passed pursuant to the Commerce Clause, the territorial waters remain a federal territory within the meaning of the OSH Act and not "a work place in a state." Furthermore, since the territorial waters of the



United States is not one of the U.S. territories listed in Section 4(a), the OSH Act does not apply to vessels operating on those waters.

### (b) Section 4(a) Does Not Cover Vessels That "Steam In And Out Of OSHA Coverage."

Assuming *arguendo* that the U.S. territorial waters could be construed to be a "work place in a state" within the meaning of Section 4(a), such an interpretation would wreck havoc in the maritime industry and would clearly create the anomaly of work places "steaming in and out of OSHA coverage." *Donovan*, 720 F.2d at 829. Indeed, the Fifth Circuit's reasoning is quite strong and describes such an interpretation of Section 4(a) as producing a "disastrous and unworkable rule." The Fifth Circuit stated:

> This would be, we think, a disastrous and unworkable rule: one that would require . . . vessels to paint all stumbling hazards yellow as they enter port, one that would forbid retaliation for complaints made to the Coast Guard in port but not for those made to it on the high seas and so forth.
>
> From *Southern S.S. [vs. NLRB, 316 U.S. 31 (1941)]*, from *Oil Chemical and Atomic Workers International Union, AFL-CIO [vs. Mobil Oil Corp., 426 U.S. 407 (1976)]*, and from common sense, we derive the principle that a single uniform set of rules should govern the maritime work place. Because of OSHA's geographic limitations [contained in Section 4(a)], this cannot be those of OSHA. 720 F.2d at 829.

Clearly, the working environment of seamen is unique as the work place itself travels from place to

place. This unique working environment must be governed by a single uniform set of rules rather than one that changes each time a vessel enters or departs the territorial waters of the United States. Section 4(a) simply does not and should not provide coverage for work places that travel in and out of OSHA's jurisdiction.

There are other compelling reasons to deny OSHA jurisdiction in this case. First, the regulations contained in 29 C.F.R. (Department of Labor standards) were not written with vessels and crewmen in mind, and in fact, operators in the marine industry were never given the opportunity to participate in the rule-making process. There was no cost benefit analysis in which vessel owners/operators were considered. All analyses of OSHA general standards were from the prospective of the shore-based industry.

When the regulations were originally published in the Federal Register as a Notice of Proposed Rule-Making, the marine industry was defined as "shipbuilding; longshoring; ship repair; or those industries now covered by 29 C.F.R. 1910." There was no indication that vessels (inspected or otherwise) were subject to those standards, nor were seamen included as individuals who would be covered by OSHA. There have been no subsequent congressional regulatory actions that have extended OSHA regulations to cover that portion of the marine industry which involves the "working conditions" of "seamen" on vessels on navigable waters.

The regulatory process is designed to afford a regulated industry an opportunity to analyze proposed standards and make constructive criticism where necessary.



**This essential part of the rule-making process helps develop reasonable safety standards that can be implemented and observed without imposing undue hardship on an industry. If the Secretary's position in this case was adopted, an entire industry, i.e., the marine industry, would be denied the opportunity to evaluate proposed OSHA regulations.**

## CONCLUSION

**In conclusion, the U.S. Fifth Circuit Court of Appeals, arguably the preeminent circuit court in the country, has reached the correct interpretation in this case. The Fifth Circuit's decision is in complete harmony with both congressional intent and federal regulatory framework. Accordingly, the Judgment of the Fifth Circuit should be affirmed.**

**Respectfully submitted,**

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# In the Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

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# In the Supreme Court of the United States

No. 00-927

ELAINE L. CHAO, SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To that end, it applies broadly to "employment performed in a workplace in a State," as well as in specified territories and "Outer Continental Shelf lands," 29 U.S.C. 653(a). It further imposes on each employer a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. 654(a)(1), as well as the obligation to comply with occupational safety and health standards promulgated by the Secretary of Labor, 29 U.S.C. 654(a)(2). See generally 29 C.F.R.

1910 (setting forth comprehensive occupational safety and health standards).

Section 4(b)(1) of the OSH Act provides that another federal agency can displace application of the OSH Act only for "working conditions * * * with respect to which [that agency] * * * exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). As we explain in our opening brief (at 16-18, 19-20), that language and its drafting history make clear that, in order to displace OSH Act coverage, an agency must not only *possess* authority to regulate occupational safety and health in a particular industry, but also actually "*exercise*" that authority. Furthermore, because the OSH Act is displaced only for "working conditions * * * with respect to *which*" the other agency has exercised its authority, an agency's regulation of *some* workplace conditions in a particular industry does not create an industry-wide exemption that displaces OSH Act regulation of *other* conditions. See *id.* at 18-19. Rather, as the drafting history confirms, see *id.* at 20-21, displacement of the OSH Act turns on whether the other agency has exercised its authority with respect to the particular working conditions at issue.

Finally, "working conditions," as used in Section 4(b)(1), means the physical and environmental hazards encountered by an employee in the course of the job, rather than the "environmental area" in which the employee customarily works. Gov't Br. 24-29. Under either definition, however, the Coast Guard has not regulated the working conditions at issue in this case, and therefore the OSH Act continues to apply. *Id.* at 29-32.



Respondent does not discuss the text or drafting history of Section 4(b)(1). Nor does respondent dispute our submission that, under a hazard-based definition of "working conditions," there is no preemption of OSH Act authority in this case because the Coast Guard has no regulation addressing the hazard at issue. See Resp. Br. 31. Instead, respondent proposes alternative interpretations of Section 4(b)(1), primarily of the term "working conditions." *Id.* at 29-35. Respondent also argues that the Coast Guard has sufficient authority over the working conditions of seamen to preclude OSH Act authority. *Id.* at 13-29. Finally, as an alternative ground for affirmance, respondent argues that a work site in the territorial waters of a State is not a "workplace in a State" covered by Section 4(a) of the OSH Act, 29 U.S.C. 653(a). Resp. Br. 35-41. Respondent's arguments misconstrue the OSH Act and the Coast Guard's authority and are unsound as a matter of policy.

1. Respondent argues that the phrase "working conditions" in Section 4(b)(1) means "the general area or work site in which employees perform their daily tasks." Resp. Br. 29. Thus, in respondent's view, "working conditions" means an entire plant or, in this case, the entire vessel on which the employees work. *Id.* at 30-31.

As we explain in our opening brief (at 25, 28), however, an area-based definition of "working conditions" cannot be reconciled with the ordinary meaning of "conditions," which are *circumstances* that exist *within* an area. Nor is an area-based definition consistent with the surrounding text of Section 4(b)(1) and its drafting history, which indicate that the OSH Act is displaced only for the "*particular* working conditions" (S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis

added)) "with respect to *which*" (29 U.S.C. 653(b)(1) (emphasis added)) another agency has exercised its authority. See Gov't Br. 18-21, 28-29. Finally, an area-based definition would frustrate the OSH Act's fundamental purpose, which is to provide comprehensive protection from occupational safety and health hazards, because that definition would result in gaps in coverage. *Id.* at 29; see pp. 5-6 *infra*.

Even the two courts of appeals that have endorsed an area-based definition of working conditions use a definition that is significantly narrower than the "entire" work site definition that respondent advocates. See Resp. Br. 30. Those courts of appeals limit the "area" that they regard as the relevant "working conditions" to that *portion* of the work site that presents the relevant hazard. See Gov't Br. 30-31. Under that approach, the OSH Act has not been displaced here, because the Coast Guard has neither promulgated regulatory requirements governing the atmosphere of uninspected barges operating on inland waters nor articulated a policy that such areas should not be subject to such requirements. See *id.* at 31-32.

Respondent's assertion (Br. 31-32) that the Secretary's approach will result in inconsistent enforcement and an unclear division of regulatory responsibility is mistaken for several reasons. First, it is based on an incorrect characterization of the Secretary's interpretation of "working conditions." Respondent asserts that, under the Secretary's interpretation, OSH Act regulation on a vessel can be preempted only if the Coast Guard "has a substantially similar or 'redundant' regulation addressing the exact same hazard and with the exact same intent." *Id.* at 31. To the contrary, under the Secretary's approach, "if the other agency has exercised its statutory authority, OSH Act



coverage is displaced regardless of whether the other agency's requirements are the same as or different from, or are more or less stringent than, the requirements that would apply under the OSH Act." Gov't Br. 16 n.5. Indeed, the Secretary recognizes that the Coast Guard may preempt OSH Act coverage of particular working conditions without imposing *any* regulatory requirements, if the Coast Guard articulates a policy that no such requirements are warranted. *Id.* at 18, 36. The Secretary's approach thus prevents duplicative regulation of the same occupational safety and health hazard and provides clear guidelines regarding the boundaries between OSHA and Coast Guard jurisdiction.

Second, respondent acknowledges (Br. 29) that other courts of appeals have approved the Secretary's approach, yet respondent points to no evidence that adverse consequences have resulted in those circuits. Moreover, as previously explained, the Secretary's longstanding approach to preemption of OSH Act coverage is similar to the approach this Court uses in addressing the parallel issue of Coast Guard preemption of state laws under Title I of the Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.* See Gov't Br. 23-24 (discussing *United States* v. *Locke*, 529 U.S. 89, 108-110 (2000)). That approach (which has been in place at least since this Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)) has not resulted in confusion and inconsistent regulation.

Third, the fundamental purpose of the OSH Act is to assure, so far as possible, safe and healthful working conditions for "every working man and woman in the Nation." 29 U.S.C. 651(b); see Gov't Br. 32-35. Respondent's proposed definition of "working conditions" would defeat that purpose. If "working conditions"

means an entire plant or an entire vessel, as respondent argues, then another federal agency's regulation of only one hazardous condition in a plant or on a vessel would prevent OSHA from regulating all other conditions, even if no other agency had authority to regulate them. For example, in respondent's view, the Coast Guard's regulation requiring the *Mr. Beldon* to have toilets that do not cause bodily injuries or allow toxic substances to escape into the interior of the vessel, 33 C.F.R. 159.95, would prevent OSHA from regulating unguarded machines and blood-borne pathogens, see *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239 (9th Cir. 1998), noise, see *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985), or the drilling hazards at issue in this case. Indeed, under respondent's theory, the Coast Guard's casualty reporting requirements, which do not set any workplace health or safety standards at all, see 46 U.S.C. 6301-6307 (1994 & Supp. V 1999); 46 C.F.R. Pt. 4, preempt all OSH Act coverage of all vessels. See Resp. Br. 18-19. Respondent's interpretation of "working conditions" would result in the kind of industry-wide exemptions and gaps in worker protection that courts have repeatedly rejected as inconsistent with the purposes of the OSH Act. See *Red Star Marine*, 739 F.2d at 780; *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976); *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 391 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977).[1]

[1] Respondent argues in the alternative (Br. 32-33) that any regulation of a "class of workers" displaces all OSHA regulation of the working conditions of those workers. As explained in the Secretary's opening brief (at 18-19, 20-21), that view of Section 4(b)(1) is inconsistent with the statutory text, and the drafting history demonstrates that the text was changed deliberately to avoid the result that respondent seeks. Respondent erroneously relies on *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975), to support its argument. Although the D.C. Circuit held in *Organized Migrants* that the EPA's regulation of farmworker exposure to pesticides preempts OSHA's regulation of that subject, see *id.* at 1163, 1169, it did not hold that another agency's regulation of *some* working conditions would preempt OSHA regulation of *other* conditions of those workers. The D.C. Circuit has specifically rejected that interpretation. See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586-587 (1994); see also Gov't Br. 40 n.20 (noting that EPA coordinated its pesticide regulation with OSHA's field-sanitation and hazard-communication standards).



In any event, the Secretary ensures against inconsistent enforcement of the OSH Act by issuing directives to compliance officers that delineate the lines of responsibility between OSHA and the Coast Guard and provide for coordination between the two agencies. See OSHA Instruction CPL 2-1.20, at 4-13 (Nov. 8, 1996) (Secretary's Exh. C-2). Such coordination occurred in this case, in which OSHA based its citations on information collected by the Coast Guard. Pet. App. 2a. Vessel owners are also well aware of the Secretary's interpretation of her OSH Act authority, because that interpretation has been set out in long-standing regulations, three decades of citations for OSH Act violations, as well as a statutorily-mandated report to Congress. See Gov't Br. 38-40; cf. *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001) (discussing varying degrees of deference to agency interpretations in administering a statute).[2]

[2] Respondent contends that the Secretary is "hypocritical" in citing employers under the OSH Act's general duty clause, 29 U.S.C. 654(a)(1), while (supposedly) arguing that the Coast Guard and other agencies must promulgate specific regulations in order to preempt the OSH Act. Resp. Br. 34. As we have explained,

2. Respondent also argues that the Secretary misconstrues the extent of the Coast Guard's authority to regulate uninspected vessels. Resp. Br. 17. In particular, respondent argues that 14 U.S.C. 2 gives the Coast Guard plenary and exclusive authority over the working conditions of seamen on vessels on navigable waters. See Resp. Br. 9-10, 13-14, 15, 18, 27-29; see also Amicus Br. of Associated Gen. Contractors of Am. (AGC) 5-12. Respondent further argues that the Coast Guard has promulgated extensive regulations that are sufficient to preempt the OSH Act. Resp. Br. 14-29; see also Amicus Br. of Transportation Inst. (TI) 4-8. Respondent's arguments do not withstand scrutiny.

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pp. 4-5, *supra*, the Secretary does not contend that other agencies may displace the OSH Act only by promulgating a specific regulation governing a specific hazard. Here, however, the Coast Guard has no regulation comparable to the OSH Act's general duty clause, 29 U.S.C. 654(a)(1), requiring uninspected vessels to be free from all recognized hazards likely to cause death or serious physical harm to employees. Coast Guard regulations do authorize Coast Guard officers to "order a vessel to operate or anchor in the manner directed" if "such [an] order is justified in the interest of safety by reason of * * * temporary hazardous circumstances, or the condition of the vessel." 33 C.F.R. 160.111. But that provision authorizes the Coast Guard to *react* to emergency situations that threaten *vessels, waterways, or waterfront facilities*; it does not prescribe fixed *standards* or impose a general duty on maritime employers to protect the *occupational safety and health* of *employees* on uninspected vessels. Nor does the statutorily-imposed and judicially-enforced duty to provide a seaworthy vessel, see 46 U.S.C. 10903; Resp. Br. 33, constitute an "exercise" of "authority" by a "Federal agenc[y]" under Section 4(b)(1). See *Tidewater Pac.*, 160 F.3d at 1246 (explaining why seaworthiness doctrine does not preempt OSH Act coverage).



a. Under 14 U.S.C. 2, the Coast Guard shall, among other things,

> administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department.

Section 2 serves as a codification and description of the Coast Guard's authority under other provisions of law. See 14 U.S.C. 2 note (Historical and Revision Notes) (explaining that Section 2 "contains a codification of functions" that "sets forth in general language the primary responsibilities of the Coast Guard" and "outline[s] in general terms in one section the broad scope of the functions of the Coast Guard"); S. Rep. No. 656, 81st Cong., 1st Sess. 3 (1949) (noting that the "primary duties of the service are stated in general terms in Section 2" and "these duties are set forth in detail" in other provisions of law); H.R. Rep. No. 557, 81st Cong., 1st Sess. 3, A2 (1949) (same). Thus, Section 2 has not been understood to be a plenary grant of independent authority, or to vest the Coast Guard with responsibility for issuing pervasive occupational health and safety regulations covering seamen in the absence of more specific statutory authority.

In any event, nothing in Section 2 precludes the exercise of authority by other agencies, such as OSHA, over seamen on navigable waters. To the contrary, Section 2 expressly recognizes that some "matters" are "delegated by law to * * * other executive department[s]." 14 U.S.C. 2. Here, the OSH Act delegates to the Secretary of Labor the authority to regulate occupational safety and health in "employment per-

formed in a workplace in a State," including on navigable waters within a State. 29 U.S.C. 653(a); see also pp. 16-19, *infra*. Nor does *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), on which respondent relies (Br. 18), suggest that Section 2 vests the Coast Guard with exclusive authority over safety on navigable waters. In that case, this Court held that a federal court had admiralty jurisdiction under 28 U.S.C. 1333(1) to decide a wrongful death action resulting from the collision of two pleasure boats on a Louisiana river. 457 U.S. at 674. The Court said nothing about 14 U.S.C. 2 or the Coast Guard's jurisdiction.[3]

Furthermore, under Section 4(b)(1) of the OSH Act, the mere possession of authority—under 14 U.S.C. 2 or any other statute—is not enough to exclude OSH Act coverage. To displace OSH Act coverage, an agency

[3] The Second Circuit in *Red Star Marine*, 739 F.2d at 778-779, explained why the lower court decisions cited by respondent (Br. 23-24, 27-29) are not persuasive. See also Gov't Br. 8-9, nn. 2 & 4; Gov't Pet. Reply 3 n.1. As for the Occupational Safety and Health Review Commission decision on which respondent relies, *Secretary of Labor* v. *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1859 (1982), subsequent Commission decisions have rejected a reading of *Dillingham* that would endorse an industry-wide exemption from OSH Act coverage for seamen and have held that working conditions on uninspected vessels may be subject to the OSH Act. See *Secretary of Labor* v. *Tidewater Pac. Inc.*, 17 O.S.H. Cas. (BNA) 1920, 1923-1924 (1997), aff'd, 160 F.3d 1239 (9th Cir. 1998); *Secretary of Labor* v. *Alaska Trawl Fisheries Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1704-1705 (1992). Moreover, contrary to respondent's contention (Br. 25), we do not seek judicial deference to *Commission* precedent interpreting Section 4(b)(1). This Court has made clear that the *Secretary's* interpretation, as reflected in her enforcement citation, not the Commission's decision, is entitled to deference. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991); Gov't Br. 38.



with authority to regulate occupational safety and health must "exercise" that authority. 29 U.S.C. 653(b)(1); Gov't Br. 14-21.[4]

b. Respondent does not dispute that the Coast Guard does not regulate the working condition at issue in this case—the risk of explosion caused by natural gas in the atmosphere of an uninspected barge drilling on inland waters. See Resp. Br. 31; see also Gov't Br. 29-32. Nonetheless, relying largely on a list of Coast Guard regulations appended to TI's amicus brief (Resp. Br. 15 (citing TI Br. App. 1a-2a)),[5] respondent argues that the Coast Guard's regulation of uninspected vessels is sufficient to displace the OSH Act. *Id.* at 15-23.[6]

[4] Amicus TI errs in contending (Br. 8-10) that 46 U.S.C. 2103 and 2104 give the Coast Guard exclusive jurisdiction over vessels. Although Section 2104 has been construed to prevent the Secretary of Transportation from delegating his statutory authority to an agency other than the Coast Guard, see *Halverson* v. *Slater*, 129 F.3d 180 (D.C. Cir. 1997), it does not prevent other agencies from exercising the authority Congress has given them under statutes such as the OSH Act. And Section 2103 expressly recognizes that "vessels and personnel" may be "subject, under other law, to the supervision of another official of the United States Government."

[5] The appendix to this brief identifies the subject matter and applicability of each of the regulations included in the Appendix to TI's brief.

[6] The American Waterways Operators (AWO) argues (Br. 2-3) that the Court should decide only whether the Coast Guard has displaced OSH Act regulation of the *Mr. Beldon* and not whether the Coast Guard has displaced OSH Act regulation of other uninspected vessels. The AWO then argues (Br. 4-23) that the Coast Guard has displaced OSH Act regulation of tugs and barges operated by its members. We only ask the Court to hold that the Fifth Circuit erred in creating an industry-wide exemption for seamen on uninspected vessels and that the Coast Guard has not displaced OSH Act regulation of the *Mr. Beldon*, either generally or with respect to the hazard at issue here. Whether the OSH Act

Respondent's argument is fundamentally flawed because, under Section 4(b)(1), OSH Act coverage is displaced only when another agency has actually exercised its statutory authority "with respect to" the "working conditions" at issue. See Gov't Br. 16-21; p. 2, *supra*. Moreover, respondent overstates the extent to which the Coast Guard regulates occupational safety and health on uninspected vessels generally and on the *Mr. Beldon* (and other uninspected barges operating on inland waters) in particular.

Respondent places special reliance (Br. 16-17) on the regulations in Subchapter C of Chapter I of Title 46 of the Code of Federal Regulations. As we explain in our opening brief (at 4-5, 9 & n.3), that Subchapter (entitled "Uninspected Vessels") contains the bulk of the Coast Guard regulations that are generally applicable to uninspected vessels, including regulations directed at occupational safety and health. Those regulations, however, address only a limited range of occupational safety and health hazards, and do not apply to all types of uninspected vessels. Of particular significance to this case, they do not apply to uninspected barges that do not carry passengers, such as the *Mr. Beldon*. See 46 C.F.R. 24.05-1 (Table 24.05-1(a) (Col.6)), 24.10-27. Nor do they address hazards related to oil drilling operations on inland waters, such as the risk of explosion from natural gas. See App., *infra*, 4a-9a.

Respondent also relies (Br. 18-23) on Coast Guard regulations that govern the reporting and investigation of marine accidents on both inspected and uninspected

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is displaced with respect to working conditions in other situations, including those involving AWO vessels, requires consideration of the particular working conditions, type of vessel, and Coast Guard regulations at issue.



vessels. See 46 C.F.R. Pt. 4 (discussed at Gov't Br. 5 n.1). Respondent argues that those regulations give the Coast Guard authority over the working conditions of seamen on uninspected vessels that is quite similar to OSHA's regulation of ordinary workplaces. Regulations that govern reporting and investigation of casualties that have already occurred, however, do not regulate "working conditions," even though marine casualties may, in some instances, result from unsafe working conditions.[7]

Many of the other Coast Guard regulations on which respondent relies apply only to certain types of uninspected vessels or to uninspected vessels engaged in certain activities. See, *e.g.*, 33 C.F.R. Pt. 156; 46 C.F.R. 42.09, 42.15. Others deal with navigation or other matters that bear only indirectly or in limited respects on workplace health and safety. See, *e.g.*, 33 C.F.R. Pt. 81; 33 C.F.R. Pt. 164; 46 C.F.R. 67.121, 67.123.[8] The only regulatory requirements identified by respondent and its amici (apart from the marine casualty reporting

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[7] Respondent also argues (Br. 19-20) that OSHA reporting requirements duplicate Coast Guard reporting requirements. Respondent, however, was not cited for violating OSHA reporting requirements. Accordingly, the question whether Coast Guard reporting requirements may in some instances preempt OSHA reporting requirements is not presented in this case. See also *Tidewater Pac.*, 160 F.3d at 1246-1247 (whether OSHA may enforce recordkeeping requirements is addressed by 29 U.S.C. 657(c)(1), not by the provision at issue in this case, 29 U.S.C. 653(b)(1)).

[8] Still others do not apply to uninspected vessels at all. See 46 C.F.R. Pts. 52, 58, 61; 46 C.F.R. 56.50-85; 46 C.F.R. 61.15-10; 46 C.F.R. 113.25; 46 C.F.R. 199.620. Section 160.151-57(p) of Title 46 imposes requirements not on vessels but on liferaft servicing facilities. And, although the *Mr. Beldon* was documented under 46 C.F.R. Pt. 67, there was no requirement that it be documented.

requirements) that applied to the *Mr. Beldon* while it was drilling in Little Bayou Pigeon are the Marine Sanitation Device regulations, 33 C.F.R. Pt. 159, and certain provisions of the Pollution Prevention, 33 C.F.R. Pt. 155, and Ports and Waterways Safety Act (PWSA) regulations, 33 C.F.R. Pt. 160. None of those provisions regulates the hazard of explosion caused by natural gas.[9] Accordingly, none represents an exercise of authority by the Coast Guard over the working conditions at issue in this case.

c. Respondent argues that exclusive reliance on Coast Guard regulations would be better policy because the Coast Guard has expertise regarding the assertedly "unique" working conditions of seamen aboard vessels, and confusion and wasted resources will result if both OSHA and the Coast Guard regulate seamen. Resp. Br.

[9] The Marine Sanitation Device regulations primarily protect the marine environment from the discharge of untreated sewage, see 33 C.F.R. 159.1, although they contain a few provisions directed at the health and safety of those on board vessels, see 33 C.F.R. 159.95, 159.129, 159.131. The Pollution Prevention Regulations are directed at preventing and responding to the discharge of oil and liquid hazardous materials from vessels, see, *e.g.*, 33 C.F.R. 155.1010, 155.1110, 155.1210, 155.2210; 33 C.F.R. Pt. 155, App. C, § 4, and require certain vessels to have response plans that address, among other things, OSHA requirements for worker health and safety hazards posed by spills, see 33 C.F.R. Pt. 155, App. C, § 2.2.16. The response plan requirements, however, apply only to vessels that carry oil as cargo, see 33 C.F.R. 155.1015, 155.1110, 155.1210, 155.2210, and only to oil spills from vessels, not to the release of natural gas from a well blowout. The PWSA regulations seek "to insure the safety of vessels and waterfront facilities, and the protection of the navigable waters and the resources therein." 33 C.F.R. 160.101. Although they may indirectly affect occupational safety and health, those provisions do not regulate or prescribe standards respecting "working conditions." See, *e.g.*, 33 C.F.R. 160.111 (discussed in note 2, *supra*).



14-15, 23-27. Contrary to respondent's assertion that the working conditions of seamen aboard uninspected vessels are "unique" (*id.* at 14), their employment often involves hazards similar to those faced by land-based employees. See *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1527, 1530 (11th Cir.) (crane safety), cert. denied, 479 U.S. 883 (1986); *Red Star Marine*, 739 F.2d at 775 (excessive noise); *Secretary of Labor* v. *Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1703 (1992) ("factory conditions" involving cleaning, processing, freezing, and packaging fish); Pet. App. 11a (respondent's drilling operations). OSHA has experience and expertise concerning such conditions, and, to the extent that further expertise is necessary, OSHA coordinates with the Coast Guard. See Gov't Br. 38 n.18.[10]

Furthermore, respondent's arguments concerning duplication and confusion are unfounded. Under the Secretary's longstanding interpretation of Section 4(b)(1), only one agency regulates a particular occupational safety and health hazard. OSHA's regulation is only displaced if another agency has promulgated a regulation governing the hazard or articulated a policy that regulatory requirements should not be imposed for that hazard or a set of hazards that includes it. See Gov't Br. 35-37; pp. 2, 4-5, *supra*. In addition, OSHA

[10] In arguing that seamen's "unique" working conditions require exclusive Coast Guard jurisdiction, respondent mistakenly relies (Br. 14) on *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 38 (1942). In that case, the Court held that the NLRB abused its discretion by requiring the owner of a ship to reinstate seamen fired for a strike that was illegal under federal maritime law. *Id.* at 38-40. The Court did not hold that the NLRB lacked jurisdiction over the seamen. Rather, the Court affirmed the Board's authority to require the shipowner to bargain with the employees. *Id.* at 48-49.

has issued enforcement directives that explain in detail the different spheres of OSHA and Coast Guard authority. See p. 7, *supra*. See also *Locke*, 529 U.S. at 108-110 (applying similar rule governing preemption of state laws by Coast Guard regulations without indicating any concern over confusion or wasted resources). Respondent's proposed approach not only is unnecessary to avoid duplication and confusion but also would defeat the OSH Act's fundamental purpose of protecting each working man and woman, 29 U.S.C. 651(b), because it would leave gaps in coverage. See Gov't Br. 32-35.

3. As an alternative ground in support of the judgment below, respondent argues (Br. 35-41) that the *Mr. Beldon* is not subject to the OSH Act because it was operating "within the territorial waters of the United States" at the time of the explosion, and such waters are not covered under 29 U.S.C. 653(a). Because that argument was not addressed by the court of appeals, Pet. App. 7a, this Court need not consider it. See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996).

Respondent's argument is also lacking in merit. The OSH Act applies "with respect to employment performed in a workplace in a State." 29 U.S.C. 653(a). Respondent stipulated that the *Mr. Beldon* was operating in a bayou about 30 miles northwest of Morgan City in the Parish of St. Martin in the territorial waters of the State of Louisiana. Exh. J-1 ¶¶ 10, 11; see also Exhs. C-4, C-5, C-6 (photographs of work site); Pet. App. 2a, 11a; Resp. Br. 2, 6. Because those waters are "internal waters of the State," *United States* v. *Maine*, 469 U.S. 504, 513 (1985), respondent's bayou work site was "in [the] State." 29 U.S.C. 653(a); see *Tidewater*



*Pac.*, 160 F.3d at 1243 (holding that a vessel on state territorial waters is a "workplace in a State").[11]

Respondent attempts to avoid the plain meaning of "a workplace in a State," 29 U.S.C. 653(a), by arguing (Br. 36-39) that the phrase refers only to land under navigable waters within a State's boundaries but not the navigable waters themselves. Congress's reference to workplaces "in a State," however, was plainly intended to identify the reach of the Act in geographic or territorial terms, and to do so comprehensively, by including all areas within the boundaries of the States. There can be no doubt that the navigable waters where respondent's barge was located, like the submerged lands underlying those waters (to which the barge was affixed, see Def's Exh. 2), are within the State of Louisiana in a geographical or territorial sense. Excluding workplaces on the waters would create a gap in coverage that the comprehensive territorial reach of the Act, set forth in Section 653(a)(1), was intended to foreclose.

Respondent's assertion (Br. 36-38) that the Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq.*, and this Court's decision in *United States* v. *Louisiana*, 363 U.S. 1 (1960), support its argument is incorrect. The SLA gives States title to and ownership of lands under "navigable waters *within the[ir] boundaries*," 43 U.S.C. 1311(a) (emphasis added), and also allows States to extend their seaward boundaries three miles from

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[11] Respondent inaccurately asserts (Br. 35) that *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983), held that a vessel operating in territorial waters of the United States is not a "workplace" under Section 4(a). The court held only that "[a] vessel *on the high seas* is not such a 'workplace.'" *Ibid.* (emphasis added).

their coast lines, 43 U.S.C. 1312. The SLA thus recognizes that State territory includes "[w]aters landward of the coastline" and "waters up to three miles seaward of the coastline," *Maine*, 469 U.S. at 513, not simply the submerged lands under those waters. Nor does the Court's discussion of the SLA in the *Louisiana* case, 363 U.S. at 8-10, suggest that waters *landward* of a State's coastline, such as a bayou in a parish in Louisiana, are outside of that State. See also *United States* v. *California*, 332 U.S. 19, 36-37 (1947) (recognizing States' authority over inland waters).[12]

Respondent notes (Br. 37-38) that the SLA preserves the federal government's right to regulate and control both submerged lands and state territorial waters for the constitutional purposes of commerce, navigation, national defense, and international affairs. See 43 U.S.C. 1314. That reservation of regulatory authority, however, does not transform navigable waters within a State's boundaries into "a federal territory within the meaning of the OSH Act and not 'a work place in a state.'" Resp. Br. 38. Instead, it recognizes the dual regulatory authority of the United States and individual States over navigable waters in the State. Cf. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199,

[12] Respondent argues (Br. 39-40) that recognizing OSH Act jurisdiction over vessels on state waters is unworkable because they would "steam in and out of OSHA coverage" when they traveled between those waters and the high seas. It is not uncommon, however, for regulatory requirements concerning vessels (even requirements imposed by the Coast Guard) to vary depending on where the vessels travel. See, *e.g.*, 46 C.F.R. 42.03-5 (load line requirements for U.S. flag vessels engaged in foreign or international voyages, domestic voyages by sea, or Great Lakes voyages).



207 (1996) (concurrent state and federal remedies for wrongful deaths within a State's territorial waters).

Similarly, 33 C.F.R. 2.05-25(a), cited by respondent (Br. 38), does not purport to define OSH Act coverage or state boundaries. Instead, it defines the Coast Guard's regulatory jurisdiction to include navigable waters, whether they are lakes, rivers, or water outside the country's coastline. See 33 C.F.R. Subpt. 2.05. That assertion of jurisdiction does not transform a lake, river, or bayou inside a State into a federal territory outside the State. Cf. *Louisiana* v. *Mississippi*, 466 U.S. 96, 99-101 (1984) (recognizing Louisiana's boundary *in* the Mississippi River). Employment in those locations is "employment performed in a workplace in a State" under 29 U.S.C. 653(a), whether or not the locations are also subject to the Coast Guard's jurisdiction.[13]

[13] Respondent asserts (Br. 40) that OSHA regulations were not written with vessels and crewmen in mind, that operators in the marine industry were never given an opportunity to participate in the rulemaking process, and that there was no cost-benefit analysis in which vessel owners/operators were considered. Because respondent did not raise that argument below or in its brief in opposition, it is waived. See Sup. Ct. R. 15.2; *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998). We note, however, that Congress required OSHA initially to promulgate regulations without notice and comment. See 29 U.S.C. 655(a); 29 C.F.R. 1910.1(a), 1910.11. When OSHA has subsequently issued regulations with notice and comment, see 29 U.S.C. 655(b), operators in the marine industry have had the same opportunities to comment as other members of the general public. The OSH Act does not require a cost-benefit analysis. See *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 506-522 (1981). Nor are OSHA's regulatory analyses limited to specific industries as respondent asserts. See, *e.g.*, 54 Fed. Reg. 9294, 9311-9312 (1989) (analyses for standards that were part of the basis on which respondent was cited in this case).

* * * * *

For the foregoing reasons, and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2001

## APPENDIX

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 33 C.F.R. Pt. 81<br>72 COLREGS: Implementing Rules | Implements the International Regulations for Preventing Collisions at Sea, including alternate requirements for light, shape, and sound signals.<br>Does not regulate occupational safety and health hazards. | Applies when vessel is in navigation on the high seas.<br>Did not apply to the *Mr. Beldon* at the time of the explosion because it was on inland waters and not in navigation. |
| 33 C.F.R. Pt. 155<br>Pollution Prevention Regulations | Contains regulations to prevent and respond to water pollution from oil or liquid hazardous substances.<br>Generally does not regulate occupational safety and health hazards, although oil spill response plan provisions require response plans to address OSHA regulations on hazardous substance releases. | Applicability varies by vessel type and activity. Most provisions, including oil spill response plan requirements, apply only to vessels that carry oil as cargo.<br>Only §§ 155.400 (platform machinery space drainage), 155.450 (placard noting that discharge of oil or oily waste is prohibited), and 155.770 (prohibition on intentional drainage of oil or liquid hazardous material into bilge) applied to the *Mr. Beldon* at the time of the explosion. |

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 33 C.F.R. Pt. 156 Oil and Hazardous Material Transfer Operations | Sets requirements for transfers of oil or liquid hazardous materials to, from, or within a vessel with a capacity of 250 barrels or more.<br>Does not regulate occupational safety and health hazards. | Applies when vessels with capacity of at least 250 barrels are transferring oil or liquid hazardous materials.<br>Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in a transfer. |
| 33 C.F.R. Pt. 159 Marine Sanitation Devices | Sets requirements for design, construction, and certification of marine sanitation devices.<br>Not primarily directed at occupational safety and health hazards. Contains a few provisions that regulate hazards (§§ 159.95, 159.129, and 159.131) unrelated to drilling operations on inland waters. | Applies to all vessels equipped with marine sanitation devices.<br>Applies to the *Mr. Beldon*. |



| Regulation | Subject Matter | Applicability |
|---|---|---|
| 33 C.F.R. Pt. 160 Ports & Waterways Safety | Implements Ports & Waterways Safety Act, 33 U.S.C. 1221 *et seq.*, and related statutes, to insure the safety of vessels and waterfront facilities and the protection of navigable waters.<br>Does not regulate occupational safety and health hazards, but may indirectly affect occupational safety and health. | Applicability varies by vessel type and activity.<br>Only §§ 160.111 (special orders applying to vessel operations) and 160.215 (notice of hazardous conditions) applied to the *Mr. Beldon* at the time of the explosion. |
| 33 C.F.R. Pt. 164 Navigation Safety Rules | Sets requirements for navigation procedure, publications, and equipment.<br>Does not regulate occupational safety and health hazards. | Applies to certain self-propelled vessels when they are destined for or departing from a United States port.<br>Does not apply to the *Mr. Beldon*, which is a barge. |

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. Pt. 16 Drug & Alcohol Testing- | Prescribes standards, procedures, and means to test for drug and alcohol use by "crew members" under 46 C.F.R. 16.105. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to vessels carrying "crew members," *i.e.*, individuals holding a license, cetificate of registry or merchant mariner's document. 46 C.F.R. 16.105. Does not apply to the *Mr. Beldon*, whose seamen were not "crew-members" under 46 C.F.R. 16.105. |
| 46 C.F.R. Pt. 24 Uninspected Vessels—General Provisions | Sets out definitions and identifies classes of vessels subject to 46 C.F.R. Pts. 25-28, the regulations generally applicable to uninspected vessels. Does not itself regulate occupational safety and health hazards. | Makes clear that none of the provisions in 46 C.F.R. Pts. 25-28 applies to the *Mr. Beldon*, an uninspected barge that does not carry passengers. |



| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 25.25 Life Preservers & Other Lifesaving Equipment | Establishes requirements for life preservers and other lifesaving equipment. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to all vessels covered by 46 C.F.R. Pts. 24-28, except vessels used or leased, rented or chartered for noncommercial use, vessels propelled by sail not carrying passengers for hire, and barges not carrying passengers for hire. Does not apply to the *Mr. Beldon*, a barge that does not carry passengers for hire. |
| 46 C.F.R. 25.26 Emergency Position Indicating Radio Beacons | Sets requirements for emergency position indicating radio beacons. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to commercial fishing industry vessels and certain other manned uninspected commercial vessels. Does not apply to the *Mr. Beldon*, a barge that does not carry passengers for hire. |

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 25.30<br>Fixed Fire Extinguishing Gear | Requires certain types of fire extinguishing equipment depending on type of uninspected vessel.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to motorboats, motor vessels, and certain barges carrying passengers.<br>Does not apply to the *Mr. Beldon*, a barge that does not carry passengers. |
| 46 C.F.R. 25.35<br>Backfire Flame Control | Requires gasoline engines installed in motorboats or motor vessels, except outboard motors, to have backfire flame control. | Applicability varies depending on type of uninspected vessel and activity.<br>Do not apply to the *Mr. Beldon*, a barge that does not carry passengers for hire. |
| 46 C.F.R. 25.40<br>Ventilation | Requires motorboats or motor vessels to ventilate their engines and fuel tank compartments. | |
| 46 C.F.R. 25.45<br>Cooking, Heating, and Lighting Systems | Regulates cooking, heating, and lighting systems on vessels carrying passengers for hire.<br>Do not regulate occupational safety and health hazards arising from drilling operations on inland waters. | |



| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 25.50<br>Garbage Retention | Requires uninspected vessels to meet garbage discharge, waste management, and placard requirements in 33 C.F.R. Pt. 151.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in an international voyage, see 33 C.F.R. Pt. 151. |
| 46 C.F.R. 26.03<br>Special Operating Requirements | Imposes special operating requirements on small passenger vessels.<br>Requires the individual in charge of an undocumented vessel involved in a marine casualty to provide necessary assistance.<br>Requires certain vessels engaged on an international voyage to have an efficient daylight signaling lamp.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applicability varies depending on vessel type and activity.<br>Does not apply to the *Mr. Beldon*, a documented barge that does not carry passengers and was not engaged at the time of the explosion in an international voyage. |

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 26.08<br>Notice & Reporting of Casualty & Voyage Records | States that requirements for notice and reporting of marine casualties and retention of voyage records are contained in 46 C.F.R. Pt. 4.<br>Does not regulate occupational safety and health hazards. | References requirements in 46 C.F.R. Pt. 4, which apply to the *Mr. Beldon*. |
| 46 C.F.R. 26.15<br>Boarding | Requires uninspected vessels that are underway to stop immediately if hailed by a Coast Guard vessel and to maneuver in a manner that permits boarding.<br>Does not regulate occupational safety and health hazards. | Did not apply to the *Mr. Beldon*, which was not underway at the time of the explosion. |
| 46 C.F.R. 26.30<br>Work Vest | Sets requirements for buoyant work vests if they are carried on a vessel.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Only applies if work vests are used. |



| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. Pt. 27<br>Towing Vessels | Regulates towing vessels.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to towing vessels.<br>Does not apply to the *Mr. Beldon*, a barge. |
| 46 C.F.R. Pt. 28<br>Commercial Fishing Industry Vessels | Regulates commercial fishing industry vessels.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to commercial fishing vessels, fish processing vessels, and fish tender vessels.<br>Does not apply to the *Mr. Beldon*, which is not any of those types of vessels. |
| 46 C.F.R. 42.09<br>Load Line Assignments and Surveys<br>46 C.F.R. 42.15<br>Conditions of Assignment of Freeboards | Sets load line and related requirements to ensure vessel stability.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies, with some exceptions, to United States flag vessels that engage in foreign or international voyages, in domestic voyages by sea, or on Great Lakes voyages.<br>Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in any of those kinds of voyages. |

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 42.15-75 Protection of the crew | Requires deckhouses for accommodation of the crew to be of satisfactory strength and requires guard rails, life lines, and gangways to meet certain requirements to ensure the safety of the crew. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies, with some exceptions, to United States flag vessels that engage in foreign or international voyages, in domestic voyages by sea, or on Great Lakes voyages. Did not apply to the *Mr. Beldon* at the time of the explosion because it was not engaged in any of those kinds of voyages. |
| 46 C.F.R. Pt. 52 Power Boilers | Sets requirements for power boilers. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel. |
| 46 C.F.R. 56.50-85 Tank-vent piping | Sets requirements for venting of containers, including fuel tanks. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel. |



| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. Pt. 58 Main Propulsion Machinery | Sets requirements for material, design, construction, workmanship, and arrangement of propulsion machinery. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel. |
| 46 C.F.R. Pt. 61 Periodic Tests and Inspections | Requires periodic tests and inspections of certain machinery and equipment. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel. |
| 46 C.F.R. 61.15-10 Liquified petroleum gas piping for heating and cooking | Requires leak tests for heating and cooking piping. Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to inspected and certificated vessels. Does not apply to the *Mr. Beldon*, an uninspected vessel. |

| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 67.121<br>Official number marking requirement<br>46 C.F.R. 67.123<br>Name and hailing port marking requirements | Sets requirements for display of number, name, and hailing port of vessel in order for certificate of documentation to be valid for vessel operation.<br>Does not regulate occupational safety and health hazards. | Any vessel of at least five net tons owned by a citizen of the United States is eligible for documentation.<br>The *Mr. Beldon* is eligible for documentation and was documented. |
| 46 C.F.R. 113.25<br>General Emergency Alarm Systems | Sets requirements for general alarm systems.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to certain inspected vessels.<br>Does not apply to the *Mr. Beldon*, an uninspected vessel. |
| 46 C.F.R. 160.151-57(p)<br>Liferaft Servicing | Prescribes information that liferaft servicing facility must include on certificate that it provides to liferaft owner when it services an inflatable liferaft.<br>Does not regulate occupational safety and health hazards. | Applies to liferaft servicing facilities, not vessels.<br>Does not apply to the *Mr. Beldon*, which is not a liferaft servicing facility. The *Mr. Beldon* is not required to have liferafts by Coast Guard regulations. |



| Regulation | Subject Matter | Applicability |
|---|---|---|
| 46 C.F.R. 199.620<br>Alternatives for all vessels in a specified service | Addresses requirements for lifesaving systems on certain inspected vessels.<br>Does not regulate occupational safety and health hazards arising from drilling operations on inland waters. | Applies to certain inspected vessels.<br>Does not apply to the *Mr. Beldon*, an uninspected vessel. |

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IN THE

# Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
*Petitioner,*

v.

MALLARD BAY DRILLING, INC.,
*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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IN THE

# Supreme Court of the United States

**No. 00-927**

ELAINE L. CHAO, SECRETARY OF LABOR,
*Petitioner*,

v.

MALLARD BAY DRILLING, INC.,
*Respondent*.

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury. Since 1947, ATLA's Admiralty Law Section has worked to protect the safety and legal rights of seamen and those who work aboard vessels.

ATLA's mission includes the active support of regulation to ensure safe workplaces. ATLA is deeply concerned that the lower court's decision in this case has the practical effect of depriving an important class of workers – seamen on uninspected vessels – of the protection of workplace safety regulations.

## SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in this case expresses a decidedly minority viewpoint among the circuits and undermines the intent of Congress to achieve maximum safety protection for all American workers. Congressional concern for the welfare and protection of seamen was demonstrated by the enactment of the Jones Act, 46 U.S.C. App. § 688, which extended the protection of the Federal Employers Liability Act, 45 U.S.C. § 51 et seq., especially including the safe place to work doctrine, to seamen.

Interpreting 29 U.S.C. § 653(b)(1) to deprive seamen working on uninspected vessels of the regulatory protection afforded by OSHA conflicts with the workplace safety protection afforded to most other American workers. This interpretation also conflicts with the rationale behind the passage of the Jones Act. Uninspected vessels, such as the drilling barge at issue here, are subject only to extremely limited Coast Guard regulation. Affirmance of the Fifth Circuit's decision would, as a practical matter, mean that workers on uninspected vessels, including seamen, would be deprived of both the full Coast Guard protection afforded



workers on inspected vessels and the extensive OSHA protection afforded most other workers.

This unfortunate result is not required by the statute. Indeed, the Fifth Circuit appears to have had to strain the relevant statutory language to reach this result. Because the Coast Guard does not exercise statutory authority to enforce standards or regulations affecting occupational safety or health as related to the working conditions, except as to a limited number of specified conditions not pertinent to the accident at issue, OSHA, and the OSHA regulations promulgated thereunder, are applicable. That is the position taken by both OSHA and the Coast Guard with respect to uninspected vessels, and their interpretation of the statute is entitled to considerable weight.

## ARGUMENT

### I. THE DECISION BELOW CONFLICTS WITH THE WELL-REASONED WEIGHT OF AUTHORITY THAT SEAMEN ON UNINSPECTED VESSELS ARE ENTITLED TO OSHA PROTECTION.

The relevant provision of the Occupational Safety and Health Act (OSHA) provides that nothing in the Act "shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). The issue before the Court is whether this language serves to insulate employees and seamen working on uninspected vessels, who are at best afforded only minimal safety protection by Coast Guard regulations, from the duty of compliance with OSHA and the OSHA regulations promulgated thereunder.

The Fifth Circuit, in the case under review, answered that question in the affirmative. *Mallard Bay Drilling, Inc. v.*

*Herman*, 212 F.3d 898 (5th Cir.), *reh'g denied*, No. 99-60124 (5th Cir. Aug. 8, 2000).[2]

ATLA respectfully disagrees with the decidedly minority viewpoint expressed by the Fifth Circuit and asserts, in accord with the majority of circuits to consider the question, that seamen employed on uninspected vessels on navigable water are entitled to OSHA protection, at least where the Coast Guard has not regulated the particular working conditions at issue.

The Fifth Circuit stands virtually alone in taking the position that "the Coast Guard has exclusive authority over the working conditions of seamen," *Mallard Bay*, 212 F.3d at 900 (citing *Clary v. Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980)), and that "OSHA regulations do not apply to *working conditions* of *seamen* on *vessels* in navigation," 212 F.3d at 900 (quoting *Donovan v. Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983) (*Mallard Bay* court's emphasis)), even where, as in the case at bar, a seaman is injured while working aboard an uninspected vessel. 212 F.3d at 901.

That position is in irreconcilable conflict with the positions taken by the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 778-80 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 594 (2d Cir. 1998); the Ninth Circuit in *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1242-46 (9th Cir. 1998), *aff'g Secretary of Labor v. Tidewater Pacific Inc.*, 17 O.S.H. Cas. (BNA) 190 (OSHRC 1997); and the Eleventh Circuit in *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530-32 (11th Cir.),

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[2] Secretary Herman's successor in office as Secretary of Labor, Elaine L. Chao, has been automatically substituted as Petitioner pursuant to Sup. Ct. R. 35(3).



*reh'g denied*, 790 F.2d 80 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1988).

While Respondent might assert that the Fourth Circuit's decision in *Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88 (4th Cir. 1980), is in accord with the Fifth Circuit's decision in the case at bar, that assertion would be without merit. The pertinent question in *Taylor* concerned whether Coast Guard regulation of carbon monoxide in the holds of vessels preempted OSHA regulation with respect to longshoremen. The *Taylor* court answered that question in the negative, and its observations pertaining to responsibility for the safety of seamen is therefore clearly dictum. Further, the *Taylor* court made no reference to the distinction between inspected and uninspected vessels, and, indeed, did not identify the class of vessels to which the vessel there at issue belonged. As perceptively observed by the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985):

> In *Taylor*, the question was whether certain Coast Guard regulations applied to "longshoremen," not whether OSHA regulations applied to "seamen" aboard uninspected vessels. Again, the court did not consider the void or *lacunae* which existed by virtue of the lack of pervasive Coast Guard regulation of working conditions of employees aboard uninspected vessels. Hence, *Taylor* cannot be said to have precedential authority.

739 F.2d at 779.

It should also be noted that a more recent Fourth Circuit case, *Reich v. Muth*, 34 F.3d 240 (4th Cir. 1994),

makes it clear that *Taylor* is not applicable to *uninspected* vessels.[3] While following *Taylor*, the *Muth* court noted:

> OSHA has acknowledged explicitly its limited authority over seamen aboard Coast Guard-inspected vessels. OSHA has entered into a "Memorandum of Understanding" with the Coast Guard, 48 Fed.Reg. 11,365 (1983), the purpose of which is to "set forth clearly the boundaries of the authority" of the Coast Guard and OSHA "in prescribing and enforcing standards or regulations affecting the occupational safety and health of seamen aboard vessels inspected and certified by the Coast Guard." *Id.* The agreement notes that "[t]he Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of seamen aboard inspected vessels." *Id.* While the agreement cedes essentially all authority over seamen to the Coast Guard, it does not address the division of responsibility between the two agencies regarding individuals other than seamen.

34 F.3d, at 244 n.2. It is highly significant that the "Memorandum of Understanding" (App. F to the Secretary's

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3 An "uninspected vessel" is defined as:

> a vessel not subject to inspection under section 3301 of this title that is not a recreational vessel.

46 U.S.C.A. § 2101(43) (Partial Revision 2000). Section 3301 lists 14 categories of vessels subject to inspection. It is undisputed that the instant drilling barge, the *Mr. Beldon*, was an "uninspected vessel."



Petition for a Writ of Certiorari) states unequivocally that "[n]othing in this MOU pertains to *uninspected* vessels" (emphasis added). *See also Herman v. Tidewater Pacific, Inc.*, where the Ninth Circuit, following its discussion of *Taylor*, stated that "[a]lthough not specifically saying so, the case seems to be like *Kopczynski* and was decided by the *status* of the plaintiff." 160 F.3d at 1245 (emphasis added) (referring to *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985)).

## II. THE DECISION BELOW LEAVES SEAMEN ON UNINSPECTED VESSELS UNPROTECTED BY ADEQUATE SAFETY REGULATION OF WORKING CONDITIONS.

When two federal agencies share the power to regulate workplace safety, the unexercised power by one agency does not preclude the other agency from exercising its concurrent authority. For example, in *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985),[4] OSHA regulations were held to apply to the plaintiff's railroad employer, in the absence of railroad regulations covering the relevant procedure and equipment to be used:

> The question before us, then, is whether *any* exercise of regulatory authority is sufficient to exempt the railroad industry from coverage by OSHA or whether only an actual exercise of authority in a particular area will exempt that area from OSHA coverage. This court has previously ruled that "OSHA's

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4 *Pratico* was questioned on other grounds (pertaining to the effect of OSHA violations) in *Elliot v. S.D. Warren Co.*, 134 F.3d 1, 4, 5 (1st Cir. 1996) (applying federal and Maine law). However, the viability of *Pratico* on the point for which it is here cited is not affected.

> authority to regulate a given working condition . . . is foreclosed only insofar as another agency has exercised its authority to regulate that working condition. Thus, in order for the exemption to apply it must be shown that another agency has exercised its authority to regulate the 'working condition' involved here."

*Id.* at 262 (quoting *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981)) (*Pratico* court's emphasis). The cases cited by the *Pratico* court on that point included *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 778 (2d Cir. 1984), and the Fifth Circuit's opinion in *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977). *Accord, Association of American Railroads v. Department of Transportation*, 38 F.3d 582, 586 (D.C. Cir. 1994). The *Southern Pacific* court concluded by holding:

> To summarize our view of section 4(b)(1), OSHA coverage is displaced by an "exercise" of DOT authority only for the "working condition" embraced by that exercise. Since DOT has not yet exercised its authority on the working conditions which are the subject of these OSHRC orders, the petitions for review are DENIED.

539 F.2d at 393 (emphasis added). In light of these authorities, 29 U.S.C. § 653(b)(1) cannot be interpreted to prevent application of OSHA to uninspected vessels since the Coast Guard has promulgated only minimal regulations with respect to such vessels.

The Coast Guard's regulation of uninspected vessels is of a highly limited nature, not at all comparable to the intensive regulation to which any workplace is subjected under OSHA. Nonrecreational uninspected vessels must



comport with the safety equipment requirements imposed by 46 U.S.C. § 4102 (Partial Revision 2000). In relevant part, that section requires fire extinguishers, *id.* § 4102(a), lifesaving equipment, *id.* § 4102(b), efficient flame arresters, backfire traps, or similar devices, *id.* § 4103(c), and the means "for properly and efficiently ventilating the bilges of the engine and fuel tank compartments, so as to remove any explosive or flammable gasses." *Id.* § 4102(a); *see also* 46 C.F.R. pts. 24, 25 (2000) (setting out certain requirements applicable to uninspected vessels). There are additional areas in which uninspected vessels are subject to Coast Guard regulation, as set out by the Ninth Circuit in *Herman v. Tidewater Pacific, Inc.*, 160 F.3d at 1242. The key point is that none of those provisions governs, or has any bearing on, safety regulation of oil and gas drilling operations.

It is submitted that the Ninth Circuit was clearly correct when holding in *Herman v. Tidewater Pacific, Inc.*:

> While uninspected vessels are subject to many statutes and regulations, *only a small subset of these apply to "working conditions of employees with respect to which [the Coast Guard] . . . exercise[s] statutory authority* to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). The all-encompassing statutory provisions regarding seaworthiness are not enforced by the Coast Guard but by the courts. 46 U.S.C. § 10903. Moreover, Coast Guard regulation of the crew is not regulation of a "working condition." We are thus left with the regulations specific to certain conditions aboard uninspected vessels and those regulations applicable when the uninspected vessel is pressed into certain services. *In light of the Coast Guard's unequivocal denial of any comprehensive*

> *regulation of uninspected vessels, the Coast Guard has not exercised its authority in this area.*

*Id.* at 1246 (emphasis added). The court therefore affirmed the decision of the OSHRC. Following a discussion of the limited scope of Coast Guard regulation, the Commission had concluded:

> As to the uninspected fleet, OSHA provides the *only* significant regulation of non-navigational working conditions for seamen employed on these vessels. Absent OSH Act coverage, these conditions would be completely unregulated.

17 O.S.H. Cas. (BNA) at 1928 (Commission's emphasis).

## III. THE DECISION BELOW CONFLICTS WITH THE POSITION OF BOTH OSHA AND THE COAST GUARD THAT OSHA REGULATIONS ARE APPLICABLE ON UNINSPECTED VESSELS.

It cannot be emphasized too strongly that this Court is not being asked to resolve a conflict over regulatory "turf" between the Department of Labor and OSHA on the one hand and the Department of Transportation and the Coast Guard on the other. Rather, these Executive Branch departments and agencies are united in the view that where uninspected vessels are concerned, the crews of those vessels are entitled to the safety protection afforded by OSHA and the OSHA regulations promulgated thereunder. The above-cited "Memorandum of Understanding" (MOU) between OSHA and the Coast Guard expressly and unequivocally stated that "[n]othing in this MOU pertains to uninspected vessels." (MOU at 1, Secretary's Appendix at 62a.)

The Fifth Circuit has not cited anything at all indicating the Coast Guard's belief, contradicting the MOU,



that employees aboard uninspected vessels were intended to be deprived of OSHA protection. Rather, this assertion has been made only by an employer desiring to avoid the burdens of OSHA regulations. Such desire should not be honored.

Attention is particularly called to a Directive recently issued by OSHA's Director of Compliance Programs, Directive CPL 2-1.20 "OSHA/U.S. Coast Guard Authority over Vessels" (November 8, 1996 [hereinafter "Directive"]). The Directive deals separately with inspected vessels, commercial uninspected fishing vessels, and (the category here at issue) *commercial uninspected vessels* (other than uninspected fishing vessels).

The Directive states:

> **Authority Over Commercial Uninspected Vessels (Other than Commercial Fishing Vessels).** The U.S. Coast Guard conducts limited safety checks on "uninspected vessels." The Coast Guard has regulations dealing with, and conducts safety checks of, working conditions on commercial uninspected vessels involving personal flotation devices, lifesaving equipment, fire extinguishing equipment, fire fighting equipment, ventilation of engine bilges and fuel tank compartments, and back-fire traps/flame arresters on inboard engine carburetors using gasoline as fuel. *Any other working condition on board a commercial uninspected vessel is subject to OSHA authority.*

*Directive* P at 13 (emphasis added). It is further provided therein:

> **OSHA Requirements Enforceable on Uninspected Vessels (Other than Commercial Fishing Vessels).** OSHA may

> exercise its authority to cite all employers for all violative working conditions affecting their employees on uninspected vessels when such violations occur within OSHA's geographical jurisdiction and when such violations are not specifically addressed by a Coast Guard regulation.
>
> 1. An owner, operator, agent or master of an uninspected vessel may be cited for hazards to which **any employees, including seamen,** it employs are exposed if the hazard is not regulated by the U.S. Coast Guard.

Directive R at 14 (emphasis in original). The Coast Guard Regulations Uninspected Vessels are listed in Appendix C of the Directive (pages 22, 23). It is reiterated that none of these regulations has even the remotest relation to the oil and gas drilling function of the drilling barge here at issue.

OSHA's longstanding construction of the OSH Act, an act which it has been entrusted by Congress to administer, is entitled to substantial deference. In the leading case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that if a

> statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 843. The Court also held that

> a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Id.* at 844. The *Chevron* court further stated that this Court has



> long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.

*Id.* In *Regions Hospital v. Shalala*, 522 U.S. 448 (1998), the Court reiterated:

> If the agency's reading fills a gap or defines a term in a reasonable way in light of the legislature's design, we give that reading controlling weight, even if it is not the answer "the court would have reached if the question initially had arisen in a judicial proceeding."

*Id.* at 457 (quoting *Chevron*, 467 U.S. at 843 n.11).[5]

To the extent that Respondent may argue that OSHA's position has been inconsistent, based on the OSHRC's statement in *Dillingham Tug & Barge Corp.*, 10 O.S.H. Cas. (BNA) 1659 (OSHRC 1982), to the effect that 29 U.S.C. § 653(b)(1) "in certain circumstances can create industry-wide exemptions from the OSH Act," 10 O.S.H. Cas. (BNA) at 1860, such an assertion would be completely without merit. In *Secretary of Labor v. Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) 169 (OSHRC 1992),

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[5] Even if "*Chevron*-style deference" is not warranted, pursuant to *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 1662-63 (2000),

> It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'

Olmstead v. Zimring, 527 U.S. 581, 119 S. Ct. 2176, 2186 (1999) (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).

the Commission rejected as obiter dictum the *Dillingham* language in question, holding:

> We believe, however, that the Commission did not hold in *Dillingham* that an industry-wide exemption had been created. The Commission observed that, under certain circumstances, such a situation *could* exist, but its disposition of the case was based on a finding that the Coast Guard had, in fact, exercised its statutory authority to regulate the working conditions that were the subject of the Secretary's citation, the hazard of a seaman's falling into the water while engaged in navigational, docking, or mooring activities. Because the Coast Guard had already regulated the general hazard addressed by OSHA's citation, the same result would have been found under the existing case law, and it was unnecessary for the majority in *Dillingham* to go as far as it did. To the extent that the discussion in *Dillingham* went beyond what was strictly necessary to adjudicate the issues presented by that case, it constituted *obiter dictum* (remarks not necessary to decide the case) and therefore is not controlling here.

*Id.* at 1704-05 (Commission's emphasis). Significantly, as pointed out in *Cook v. Ancich*, 119 F. Supp. 2d 1118 (W.D. Wash. 2000), in *Alaska Trawl Fisheries, Inc.*:

> [B]oth the secretary [of Labor] and the Coast Guard via an *amicus* brief argued that OSHA regulations were applicable to the working conditions on the uninspected vessels in question.

119 F. Supp. 2d at 1119; *see Alaska Trawl Fisheries, Inc.*, 15 O.S.H. Cas. (BNA) at 1702-03.



In any event, the Court has held that deference is owed to the Secretary's interpretation of the statutory language, and not to that of the Commission. *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 150-53 (1991); *accord CH2M v. Hill, Inc.*, 192 F.3d 711, 716 (7th Cir. 1999).

## IV. THE DECISION BELOW CONFLICTS WITH THE INTENT OF CONGRESS TO PROVIDE SAFE WORKING CONDITIONS FOR ALL WORKERS.

The OSHA Directive referred to above emphasized that Congress did not intend that any group of workers be left without the protection of workplace safety regulations:

> The legislative history, as a whole, clearly shows that every amendment or other proposal which would have resulted in any employee's being left outside the protections afforded by the Act was rejected. The reason for excluding no employee, either by exemption or limitation on coverage, *lies in the most fundamental of social purposes of this legislation which is to protect the lives and health of human beings in the context of their employment.*

29 C.F.R.§ 1975.3(a) (emphasis added). It is further provided:

> (c) In the case of section 4(b)(1) of the Act, which makes the Act inapplicable to working conditions to the extent they are protected under laws administered by other Federal agencies, *Congress did not intend to grant any general exemptions under the Act*; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a

> national policy of occupational safety and health protection.

*Id.* § 1975.3(c) (emphasis added).

The crux of the case cannot be summed up more cogently than was done by the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*:

> It would do violence to the clear intent of Congress to hold that these instances of Coast Guard regulations of working conditions aboard uninspected vessels would serve to deny an entire class of employees the protection of major safety legislation such as the OSH Act. There can be no doubt that it was the intent of Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. § 651(b). . . . It is also beyond question that section 4(b)(1) of the OSH Act should be interpreted and applied "to achieve the maximum protection for the industrial workers of the Nation." *Southern Ry. Co.*, 539 F.2d at 338.

739 F.2d at 780 (emphasis added) (citation omitted). *See also, e.g., Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980).(the OSH Act "is to be liberally construed to effectuate the congressional purpose"). As the court emphasized in *E&R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3d Cir. 1997):

> In light of the OSH Act's broad remedial purpose, the Act and regulations issued pursuant to it should be liberally construed so as to afford the broadest possible protection to workers.

*Id.* at 160 (citing *Whirlpool*, 445 U.S. at 12, 13).



The *Red Star Marine* court concluded, on the relevant point:

> To agree with the views expressed by Red Star would result in this Court mandating the *status quo*. *As a practical matter, this would mean that neither OSHA nor the Coast Guard would exercise authority over the uninspected vessel fleet, to the detriment of those employees* exposed to the hazard of excessive noise.
>
> *In light of the extensive tradition of congressional concern for mariners, Congress could not have intended that employees aboard uninspected vessels be deprived of the protections accorded the vast majority of American workers by the OSH Act*, and those protections offered employees aboard inspected and certificated vessels. It is clear that the Coast Guard's regulation of uninspected vessels is limited to only a few areas. Consequently, it cannot be said that it is exercising jurisdiction sufficient to regulate comprehensively the working conditions of employees aboard uninspected vessels.
>
> Since the Coast Guard is not exercising statutory authority within the meaning of section 4(b)(1) of the OSH Act, we hold that OSHA possesses statutory authority to regulate the working conditions of employees aboard uninspected vessels.

739 F.2d at 780 (emphasis added). This language aptly states the rationale compelling reversal of the Fifth Circuit decision under review.

## CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

# BRIEF OF AMICUS CURIAE THE AMERICAN WATERWAYS OPERATORS IN SUPPORT OF RESPONDENT

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This brief is filed by The American Waterways Operators (AWO) as *amicus curiae* in support of the position of Respondent Mallard Bay Drilling, Inc.[1] AWO submits this brief with the written consent of all parties, which accompanies this brief at Appendix 1a-2a. *See* Sup. Ct. R. 37(3)(a).

## I. INTERESTS OF *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS

AWO is the national association representing the tugboat, towboat and barge industry in the United States. AWO's 375 member companies operate thousands of tugs, towboats, and barges, most of which are "uninspected vessels" within the meaning of 46 U.S.C. § 2101(43), and many of which operate both inside and outside the territorial waters of any State. Those vessels are already regulated by the United States Coast Guard, but would also be regulated by the Occupational Safety and Health Administration ("OSHA") if this Court accepted Petitioner's invitation to hold that the Occupational Safety and Health Act of 1970 ("OSH Act" or the "Act") applies to all uninspected vessels.

AWO members include transporters of bulk commodities and oil, ship docking and harbor services providers, fueling, bunkering, and lightering services operators and shipyards. For over fifty-seven years, AWO has worked to promote a better understanding of the unique nature of the domestic waterborne transportation industry and its safe and environmentally sound contribution to the U.S. economy. In 1995, AWO and the Coast Guard entered into a written agreement establishing the Coast Guard-AWO Safety Partnership[2] illustrating the shared commitment of the Coast Guard and AWO to

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[1] Counsel for *amicus curiae* AWO authored this brief in its entirety. No person or entity other than AWO provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

[2] *See* "United States Coast Guard and American Waterways Operators Outline of Quality Partnership for Marine Safety and Environmental Protection" dated September 19, 1995, copy attached as App. 3a-5a.

"ensur[ing] the safety of U.S. waters, vessels and crews." *Id.* at App. 3a.

The U.S. barge and towing industry is a diverse and vital segment of America's interstate transportation system. Barges and towing vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals. The industry operates approximately 5,000 tugs and towboats and more than 25,000 barges, which contribute more than $5 billion a year to the nation's economy.

Tug and barge transportation provides America's shippers with a highly cost-efficient and reliable means of moving the raw materials that fuel the nation's economy. Indeed, barges move fifteen percent of our nation's freight for less than two percent of the nation's total freight bill. The economic efficiency of barge transportation is matched by its energy efficiency. In fact, barging is America's most energy efficient mode of surface transportation. One gallon of fuel will move a ton of cargo more than 500 miles by tug and barge.

The U.S. tug and barge industry is committed to providing safe working conditions for its employees. In addition to the Safety Partnership mentioned above, the industry has worked closely with the U.S. Coast Guard to upgrade regulatory standards in such key areas as towing vessel operator qualifications and navigation equipment on towing vessels. That commitment is also demonstrated by industry-driven safety initiatives like the AWO "Responsible Carrier Program," a code of safe practices for tug and barge companies, with which all AWO members comply as a condition of association membership.

## II. SUMMARY OF ARGUMENT

AWO respectfully submits that Petitioner's statement of the issue before the Court is overly broad, and invites the Court to decide questions not properly presented in the record below. OSHA's jurisdiction cannot depend simply upon whether a vessel is classified as "uninspected," because uninspected vessels are not all the same. The Coast Guard regulates uninspected tugs and barges



operated by AWO members differently than it regulates the uninspected drilling rig operated by Respondent Mallard Bay. The record below concerns Mallard Bay's drilling rig, not the tugs and barges operated by AWO's members, even though both types of vessels are "uninspected."

AWO agrees with Respondent that, for the reasons relied upon by the Fifth Circuit, there is an industry-wide exemption for "working conditions of seamen on vessels in navigation," *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898, 900 (5th Cir. 2000). Even if there were no industry-wide exemption, however, the OSH Act does not apply to uninspected tugs and barges because the Coast Guard has "exercise[d] statutory authority," 29 U.S.C. § 653(b)(1), over such vessels through a comprehensive set of regulations. These comprehensive Coast Guard regulations assure safe and healthful working conditions aboard uninspected tugs and barges.

At a minimum, the record before this Court is insufficient to support a general rule that the OSH Act applies to all uninspected vessels. Rather, the lower court should determine whether the Act applies based on an evaluation of the specific Coast Guard regulations applicable to the particular uninspected vessel and workplace at issue. As Petitioner itself states: "The working conditions at issue are the conditions faced by employees on an uninspected vessel engaged in oil drilling operations on inland waters – in particular, the risk of explosion caused by the presence of natural gas in the atmosphere of the vessel." Pet. Brief at 31, (emphasis added).[3] AWO respectfully submits that the Court should affirm the decision below, or remand with instructions to determine

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[3] AWO respectfully submits that the description of the Question Presented contained in Petitioner's Brief – "[w]hether the United States Coast Guard has 'exercise[d] statutory authority . . . concerning the 'working conditions of employees' . . . on 'uninspected vessel[s]'" Pet. Brief at (I) – is inconsistent with the above-quoted statement and other such statements by Petitioner regarding the specific and limited working conditions at issue in this case. *See also* Pet. Brief at 12. The Question Presented by Petitioner is overly broad and invites the Court to decide questions not properly developed in, or presented by, the record below. *See* discussion at page 5.

whether the Coast Guard has exercised sufficient authority with respect to the specific vessel at issue in this particular case – Mallard Bay's drilling rig – without regard to whether the Coast Guard exercises sufficient authority with respect to uninspected vessels as an undifferentiated group.

## III. ARGUMENT

Most of the tugs and barges operated by AWO's members are uninspected vessels within the meaning of 46 U.S.C. § 2101(43) and 46 U.S.C. § 3301.[4] Tugs over 300 gross tons operating beyond the Boundary Line[5] are inspected because they are classified as "seagoing motor vessels," 46 U.S.C. § 2101(33), but most tugs are under 300 gross tons or operate inside the Boundary Line, rendering them "uninspected." "Seagoing barges" are inspected vessels if they are manned or if they carry hazardous material as cargo or if they carry flammable or combustible liquids in bulk. 46 U.S.C. § 3302(m). Most barges are unmanned and do not carry these types of cargo, and hence most are uninspected vessels.

Petitioner correctly points out that all types of uninspected vessels, including both Mallard Bay's drilling rig and the uninspected vessels operated by AWO's members, are regulated by the Coast Guard. Petitioner attempts to minimize the Coast Guard's regulation of Mallard Bay's drilling rig, but in fact 46 U.S.C. §§ 4101-06:

- prescribe the number, type, and placement of fire extinguishers on the rig, 46 U.S.C. § 4102(a);
- prescribe the number and type of life preservers on the rig, 46 U.S.C. § 4102(b);

[4] 46 U.S.C. § 3301 lists fourteen categories of vessels that are "subject to inspection," subject to certain exceptions listed in 46 U.S.C. § 3302. The fourteen categories are in turn defined in 46 U.S.C. § 2101.

[5] The Boundary Line is a line established pursuant to 33 U.S.C. § 151 not more than twelve miles offshore. 46 U.S.C. § 2101(3). *See also* 46 CFR Part 7.



- require flame arrestors, backfire traps or similar devices on the rig's carburetors, 46 U.S.C. § 4102(c);
- require ventilation of the rig's engine bilges and fuel tank compartments, 46 U.S.C. § 4102(d); and
- prescribe the number and type of alerting and locating equipment, including emergency position indicating radio beacons, that must be on the rig (if it operates beyond three miles from shore), 46 U.S.C. § 4102(e).

Petitioner also briefly acknowledges, but attempts to gloss over, the numerous other Coast Guard regulations that apply to some categories of uninspected vessels, including tugs and barges of the types operated by AWO's members. See Brief for Petitioner at notes 1 and 13. Examination of those and other regulations demonstrates that, with respect to tugs and barges, the Coast Guard clearly has, and exercises, "authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). See discussion below at pages 7 – 18.

### A. The record below dealt with Mallard Bay's drilling rig, not with uninspected tugs and barges of the types operated by AWO's members, and hence that record is insufficient to support applying the OSH Act to all uninspected vessels generally.

The record below concerned Mallard Bay's drilling rig, not uninspected tugs and barges of the types operated by AWO's members. Neither the Occupational Safety and Health Review Commission ("OSHC" or the "Commission") nor the court below had any reason to consider the Coast Guard's authority over workplace safety on uninspected tugs and barges. Hence the record before this Court does not include "data and arguments adequate to inform the Court's judgment"[6] about all uninspected vessels.

[6] *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 106 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (relating to significant constitutional questions).

Accordingly the Court should decline Petitioner's invitation to announce a general rule of law applicable to all uninspected vessels.[7]

The record below shows that OSHA cited Mallard Bay for "failing to timely evacuate employees on board the drilling rig . . . failing to develop and implement an emergency response plan to handle anticipated emergencies . . . and failing to train employees in emergency response."[8] Although not part of the record before the OSHC or the Fifth Circuit, Coast Guard regulations do require uninspected tugs to meet training, safety, and emergency response standards that include monthly safety drills, monthly safety instruction, and a safety orientation program for all new crew members, 46 CFR 27.245 (relating primarily to fire emergencies), as well as emergency instructions as required by 46 CFR 26.03-2. See discussion beginning at page 12, below. On uninspected tugs, therefore, the Coast Guard clearly "exercise[s] statutory authority to prescribe or enforce standards or regulations," 29 U.S.C. § 653(b)(1), pertaining to hazards like those for which Mallard Bay was cited by OSHA.

In the proceedings below, there was obviously no reason for the parties to develop facts related to tugs. However, the absence of a record concerning Coast Guard regulation of uninspected tugs means that the record before this Court is an insufficient basis to accept Petitioner's invitation to hold that the OSH Act applies to all

[7] *Id.* *See also Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 278 (1989) (declining to "attempt to decide the question in the absence of a record"); *Berkovitz v. United States*, 486 U.S. 531, 545 (1988) ("Given that these regulations are particularly abstruse, we hesitate to decide the question on the scanty record before us"); *Cowgill v. California*, 396 U.S. 371 (1970) (Harlan, J. concurring) ("I would therefore dismiss this appeal based on the inadequacy of the record for deciding the question presented"); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (dismissing certiorari as improvidently granted "in view of ambiguities in the record as to the issues sought to be tendered").

[8] *Secretary of Labor v. Mallard Bay Drilling, Inc.* (OSHRC Docket No. 97-1973), reprinted at Pet. App. 9a.



uninspected vessels.[9] The question presented by the record in this case is limited to Mallard Bay's drilling rig, not all uninspected vessels.

### B. The Coast Guard exercises statutory authority over uninspected tugs and barges with respect to workplace safety.

The Coast Guard's regulations concerning the occupational safety and health of employees on uninspected vessels of the types operated by AWO's members fall into four general areas: safe construction, safe equipment, safe crewing, and safe practices. Taken together, these regulations are precisely the type of comprehensive "exercise [of] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" that Congress intended would preclude OSHA jurisdiction under Section 4(b)(1).

#### 1. Coast Guard regulations "affect[] occupational safety and health" within the meaning of Section 4(b)(1) by requiring uninspected vessels of the types operated by AWO members to be constructed safely.

All vessels, including uninspected vessels, that are over 150 gross tons and that are engaged in coastwise, intercoastal, or foreign voyages must have a load line. 46 CFR 24.03-5. Many of the tugs and barges operated by AWO members meet these requirements and hence have load lines. In order to obtain a load line, a vessel must be surveyed, and it must be re-surveyed at least every five years. 46 CFR 42.09-15. As part of the survey, the vessel must be placed in drydock, 46 CFR 42.09-25(a), and the surveyor must examine at least the following items, all of which help to assure the "occupational safety or health" of workers on the vessels within the meaning of Section 4(b)(1):

- "all means of protection provided for openings, such as for ventilators," 46 CFR 42.09-25(b)(2);

[9] *See* cases cited at note 7.

- "all guardrails, bulwarks, gangways and freeing port shutters, including securing devices, and bars," 46 CFR 42.09-25(b)(7);
- fittings for deck lashings, "including . . . protective devices as may be necessary for ventilators and steering arrangements," 46 CFR 42.09-25(b)(8);
- "all gangways, cargo ports, and airports," 46 CFR 42.09-25(b)(6); and
- air-pipe outlets, scuppers, and sanitary discharges in the vessel's sides, 46 CFR 42.09-25(b)(4).

In addition, other regulations prescribe standards for various parts of the vessel as follows:

- Openings in the bulwarks shall be protected by rails or bars spaced approximately 9 inches apart. 46 CFR 42.15-70(f).
- The height of sills of doorways and of access openings in bulkheads is specified for various portions of the vessel. 46 CFR 42.15-40(c), 42.15-10(b).
- "Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel." 46 CFR 42.15-75(d).
- "Efficient guard rails or bulwarks must be fitted on all exposed parts of the freeboard and substructure decks." 46 CFR 42.15-75(b) (specifying height of bulwarks or guard rails above the deck and the spacing of the rails).

Thus the load line requirement assures (albeit indirectly) that uninspected vessels are constructed and maintained to standards that "protec[t] the crew." 46 CFR 42.15-75(d).



**2. Coast Guard regulations "affect[] occupational safety and health" within the meaning of Section 4(b)(1) by requiring uninspected vessels of the types operated by AWO members to have safety equipment.**

In addition to the safety standards for vessel construction required by the load line requirements of 46 CFR 42.09, Coast Guard regulations also prescribe in detail various items of safety equipment that tugs such as those operated by AWO members must have on board, even though the tugs are uninspected vessels. For example, 46 CFR 25:

- prescribes the types of life preservers and ring life buoys that must be on board, §25.25-5, how they are to be marked, §25.25-7, and how they are to be stored, §25.25-9;
- requires life preservers to have an approved "personal flotation device light," §25.25-13, prescribes how the light has to be attached, §25.25-15, and specifies the type of reflective material on the life preserver, *id.*;
- requires the vessel to have an Emergency Position Indicating Radiobeacon (EPIRB) that will float free if the vessel sinks, §25.26-10, and prescribes the testing of the EPIRB, §25.26-50;
- prescribes the number of, and maintenance procedures for, fire extinguishing equipment, §25.30; and
- prescribes standards for ventilation of tanks and engine spaces, §25.40.

Uninspected towing vessels are subject to additional safety requirements in Part 27 of 46 CFR. Those requirements assure that the crew of an uninspected tug is able to respond to workplace emergencies safely. For example, effective October 8, 2001, each tug must be equipped with

- a general alarm to "notify persons on board in the event of an emergency," §27.205(a), and that is tested at least once each week, §27.205(a)(4);

- in the engine room and other potentially noisy parts of the vessel, a flashing red light and a sign near the general alarm that reads "Attention General Alarm—When Alarm Sounds or Flashes Go to Your Station," §27-205(a)(3);
- a system for detecting engine-room fires, §27.210;
- a system for communicating with the engine room, §27.215; and
- a remote fuel shutoff valve that is located near the fuel supply, that can be operated from "a safe place outside the space in which the valve is located," and that is "marked in clearly legible letters at least 25 millimeters (1 inch) high indicating the purpose of the valve and the way to operate it." §27.340(f).[10]

The foregoing requirements apply to existing tugs. Additional requirements apply to tugs for which construction contracts were signed on or after January 18, 2000. See 46 CFR 27.101 (defining "New Towing Vessel") and 46 CFR 27.300-355 (prescribing substantive fire protection measures for New Towing Vessels).

Finally, 33 CFR 164.72 requires vessels to be equipped with radar, a searchlight, a radio, a compass, an echo depth sounding device, appropriate charts, and a global positioning system or other electronic position-fixing device.

[10] Although 46 CFR 27.340(f) is included with the "new towing vessel" regulations, §27.230 provides that even for existing tugs "by October 8, 2001, you must have remote fuel shutoff that meets §27.340(f) installed on your vessel."



**3. Coast Guard regulations "affect[] occupational safety and health" within the meaning of Section 4(b)(1) by requiring uninspected vessels of the types operated by AWO members to be manned by crew members who are qualified and whose hours of work are regulated.**

In light of the inherent dangers of the sea, the most effective way to assure workplace safety for employees on vessels is to prescribe the qualifications, number, and hours of work of the crew. The Coast Guard has done this for uninspected vessels of the types operated by AWO's members.

First, Part 15 of 46 CFR specifies manning requirements for uninspected vessels. 46 CFR 15.103(a). Section 15.610 requires towing vessels at least 26 feet long[11] to be under the direction and control of a licensed master or mate "holding an endorsement on his or her license for towing vessels." In addition, Section 15.601 incorporates by reference numerous provisions of subparts F, G, and H of Part 15. Those subparts in turn trigger the application of additional regulations, many of which are quite lengthy and detailed. For example, Section 15.601 incorporates Section 15.701, which effectively makes many uninspected vessels operated by AWO members subject to over 90 pages of regulations in the CFR setting forth various licensing requirements for crew members and types of equipment, all for the purpose of assuring safety.[12]

[11] Nearly all of the tugs operated by AWO members are more than 26 feet long.

[12] Section 15.601 incorporates Section 15.701. Section 15.701 applies to uninspected vessels over 200 gross tons operating seaward of certain Boundary Lines set forth in 46 CFR 7.1 – 7.180. On those vessels (many of which are uninspected vessels operated by AWO members), the master, mates and engineers are required to hold licenses issued by the Coast Guard under part 10 of 46 CFR. Part 10 consumes approximately 90 printed pages in the Code of Federal Regulations. *See also* Section 15.730, which is also incorporated by reference through Section 15.601, and which prescribes certain language requirements for crew members.

Second, the Coast Guard limits the hours of work of crew members. 46 U.S.C. § 8104 and 46 CFR 15.705 (another provision that section 15.601 incorporates by reference) require the establishment of "watches" on vessels operated by AWO members, including uninspected vessels. In general, three watches are required on seagoing vessels, and two watches are required on a voyage of less than 600 miles.

Third, Coast Guard regulations require comprehensive drug testing of crew members, again in recognition of the fact that the most effective way to assure a safe workplace at sea is to assure that the vessel's crew is qualified. 46 CFR Part 16 requires pre-employment testing, random testing during employment, and testing after any "serious marine incident" (a term which includes most accidents). 46 CFR 16.210, 230, and 240, respectively. In addition, 46 CFR 16.401 requires adoption of an Employee Assistance Program.

**4. Coast Guard regulations "affect[] occupational safety and health" within the meaning of Section 4(b)(1) by requiring uninspected vessels of the types operated by AWO members to utilize practices and procedures that promote workplace safety.**

Safe construction, safe equipment, and a safe crew are all important elements of workplace safety. The Coast Guard's regulations in those areas demonstrate that, for the types of tugs and barges operated by AWO's members, the Coast Guard "exercise[s] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" within the meaning of Section 4(b)(1). In addition, the Coast Guard requires certain specified safe working practices. For example:

- Personnel on each towing vessel must perform safety drills at least once each month. 46 CFR 27.245 (incorporating standards for New Towing Vessels set forth in 46 CFR 27.355).



- Personnel on each towing vessel must receive safety instruction at least once each month. *Id.*
- Each new crewmember must receive a safety orientation within 24 hours of reporting for duty. *Id.*
- Operators of uninspected vessels must prepare and post an "emergency checkoff list" as "a reminder to the crew of precautionary measures which may be necessary in the event of an emergency situation." 46 CFR 26.03-2(a) (covering emergencies including rough weather, crossing hazardous bars, man overboard, as well as fire at sea).
- Both the towlines and the gear used to attach the towline to the tug and to the barge must meet the detailed requirements of 33 CFR 164.74,[13] including maintaining a logbook or other record of the condition of the towline and of when it was inspected, 33 CFR 164.74(a)((3)(v), and also including "a method . . . that does not endanger operating personnel but that easily releases the towline." 33 CFR 164.74(b)(4).

It is important to note that the Coast Guard regulations discussed immediately above require uninspected tugs to adopt emergency preparedness and emergency response measures – the type of deficiencies for which OSHA cited Mallard Bay's drilling rig. *See* page 8, above. In other words, if an uninspected tug did not have emergency response plans meeting the requirements discussed above, the failure to do so would violate existing Coast Guard regulations applicable to uninspected tugs. For OSHA to inject its own, additional regulations would be to create precisely the overlapping regulatory regimes that Congress prohibited in Section 4(b)(1).

More generally, the Coast Guard regulations discussed at pages 7 – 18 describe a regime intended to promote and assure workplace

[13] *See e.g.*, 33 CFR 164.74 (b)(2), which provides that "each connection is secured by at least one nut with at least one cotter pin or other means of preventing its failure."

safety on uninspected vessels. That discussion demonstrates that Petitioner is incorrect when it asserts that "occupational safety and health of workers on uninspected vessels, therefore, are largely unregulated by the Coast Guard." Pet. Brief at 4-5. On the contrary, the Coast Guard regulations are the type of "regulations affecting occupational safety or health" that preclude OSHA jurisdiction under Section 4(b)(1).

### C. The Coast Guard actively regulates workplace safety on uninspected tugs and barges.

The Coast Guard workplace safety regulations discussed above are not a dead letter. The Coast Guard actively regulates uninspected vessels. As noted above, many of the regulations are relatively new and will become effective on October 8, 2001. Of the regulations discussed above, nine were adopted after the March 17, 1983 Memorandum of Understanding between OSHA and the Coast Guard ("MOU"),[14] and another six were initially adopted prior to the MOU but were amended after it. Furthermore, by notice published in the Federal Register on November 8, 2000, the Coast Guard has proposed additional safety regulations requiring installation of fixed fire-extinguishing systems in the engine rooms of towing vessels. 65 Fed. Reg. 66941 (Nov. 8, 2000). Clearly the Coast Guard actively regulates workplace safety on vessels of the types operated by AWO members, even though those vessels are uninspected.

The Coast Guard touts its own role as a safety agency. In its 1999 Annual Report, the first of the Coast Guard's five strategic goals is maritime safety. 1999 Annual Report of the U.S. Coast Guard at 4.[15] The Annual Report goes on to state that in 1999 the Coast Guard conducted "more than 50,000 inspections on merchant vessels." (It is noteworthy that in its own count the Coast Guard does not distinguish between inspected and uninspected vessels.)

[14] Reprinted as Pet. App. 62a-65a.

[15] Posted on Coast Guard web site at http://www.uscg.mil/news/1999Report.pdf.



The Coast Guard clearly believes that it has important safety functions to perform in connection with uninspected vessels such as those operated by AWO's members, because the Coast Guard and AWO entered into a written agreement establishing the Coast Guard-AWO Safety Partnership. (Copy attached as App. 3a-5a.) In that document, the Coast Guard agreed that the objectives "for both the USCG and AWO, are to improve vessel and personnel safety within the barge and towing industry . . . ." *Id.* at 3a. Although the Partnership is described as "a program of cooperative informal, structured processes that will address issues of marine safety and environmental protection," *id.*, the document is careful to reserve for the Coast Guard its role as safety regulator. The Partnership, the document emphasizes, is not intended "to subvert the legitimate role of government regulation in establishing minimum standards necessary to ensure the safety of U.S. waters, vessels and crews." *Id.*[16]

The Coast Guard's Cooperative Towing Vessel Examination Program ("CTVEP") illustrates the Coast Guard's active and extensive regulation of workplace safety on towing vessels.[17] The CTVEP combines voluntary inspections with unannounced, random boardings to assure safety. Under the program, participating towing vessels are voluntarily inspected by the Coast Guard. If the vessel passes the inspection, it receives a decal and generally will not be subject to unscheduled random boardings by the Coast Guard. Vessels that do not participate remain subject to random boardings.[18]

[16] Once again, the document does not differentiate between inspected and uninspected vessels. However, most of the vessels operated by members of AWO are uninspected. Therefore it would make little sense for the Coast Guard to emphasize its regulation of inspected vessels in an agreement with an organization of operators of uninspected vessels.

[17] The CTVEP is a program of the Eighth District of the Coast Guard. The Eighth District includes Louisiana, where Mallard Bay's drilling rig operated.

[18] The Eighth District Instruction 16710.1 regarding CTVEP (copy attached as App. 6a-54a) states: "Unscheduled boardings of 'decaled' towboats shall normally be limited to a check of principal lifesaving and firefighting equipment, as well as

As part of the voluntary CTVEP inspection, the Coast Guard uses a checklist containing the following items under the heading "Safety Policy/Procedures:"

"1. Is there a company safety policy and is [sic] understood by the employees?

"2. Is there a set of specific safety rules?

"3. Is there personal protective gear which includes, at a minimum:

- Usage instructions
- Inspection procedures
- Maintenance procedures
- Replacement schedules

"4. Are there procedures for safety and training drills?

"5. Is there a safety training plan with a list of topics to be covered?

"6. Are there scheduling and frequency procedures for safety and training drills?

"7. Are there procedures for the documentation of safety and training drills?

"8. Are there procedures for the safe use of vessel equipment such as rigging, deck machinery [sic]?

"9. Are there procedures for the crew to be aware of the cargo they are carrying and it's [sic] possible hazards?"[19]

The Coast Guard's explanation for the CTVEP program demonstrates the Coast Guard's commitment to assuring safe

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personnel licenses and documents. . . . Commercial towing vessels without a decal will continue to be subject to random unscheduled boardings." *Id.* at 8a.

[19] *Id.*, Quality Verification Check List Section B. App. 26a.



working conditions for employees on uninspected vessels in the most effective way possible:

> Historically, the Coast Guard conducted unscheduled boardings to ensure that commercial operators complied with applicable U.S. laws and regulations. Penalties were assessed for deficiencies identified. Working with the industry, the Coast Guard became convinced that there is a better way to enhance safety on fleet and line boats. It is believed that a higher level of safety and a more efficient use of resources will be assured through a cooperative voluntary dockside examination program. This is the basis on which the CTVEP was founded.

*Id.* at App. 14a.

The Coast Guard's safety enforcement program for uninspected towing vessels is not limited to the voluntary CTVEP program. For vessels that do not participate in CTVEP, the Coast Guard still conducts unscheduled boardings using the Eighth Coast Guard District Towing Vessel Boarding Form (copy attached at App. 28a-34a.) That Boarding Form contains over 60 specific items that Coast Guard personnel are to check when boarding a towing vessel, such as the ones operated by AWO's members. While some of these sixty items might not be considered matters "affecting occupational safety or health," 29 U.S.C. § 653(b)(1), many of the items on the Boarding Form clearly and specifically regulate the working conditions of employees on the vessel. For example, Section I of the Boarding Form specifically identifies the following:

- "Living spaces are clean, no build up of debris nor evidence of smoking in bed"
- "Galley cleanliness and refrigeration"
- "Machinery spaces condition: guards in place around all moving machinery, piping is in good condition, no hazards noted"

- "Electrical systems: no jury rigged wiring, guards and globes cover exposed lights in work or external areas, electrical boxes are in satisfactory condition, switches are covered"

*Id.* at App. 32a (emphasis added).

These are not the actions of an agency disinterested in workplace safety on uninspected vessels. On the contrary, these actions are an explicit assertion of regulatory jurisdiction and an effort to work with the towing operators to enhance the workplace safety of uninspected towing vessels. The Coast Guard's active and ongoing regulation of uninspected towing vessels – including both voluntary and involuntary inspections – contradicts Petitioner's assertion that the Coast Guard "does not have and has not exercised comprehensive authority over the working conditions on uninspected vessels." Pet. Brief at 11-12. Having joined with the towing industry in an effort to promote safety on uninspected vessels, the Coast Guard should not now be heard to disclaim regulatory jurisdiction over such safety.

### D. OSHA regulation of uninspected vessels of the types operated by AWO's members would be unworkable, because those vessels sail "in and out of [OSHA's] coverage."

OSHA's statutory jurisdiction is limited to workplaces located in a State. 29 U.S.C. § 653(a). However, many of the AWO members' vessels operate both inside and outside the boundaries of any state. If the OSH Act were applied to all uninspected vessels, "seamen on [such] a vessel [would] steam in and out of OSHA coverage as they enter or depart ports in United States territory." *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983). Applying the OSH Act to all uninspected vessels would therefore be unworkable.

As Petitioner acknowledges, "the OSH Act applies to 'employment performed in a workplace in a State,' as well as in specified territories and 'Outer Continental Shelf lands.'" Brief of



Petitioner at 2, quoting 29 U.S.C. § 653(a) (emphasis added). AWO estimates that its members operate approximately 200 tugs that regularly perform international voyages or otherwise operate beyond the waters of any state. If this Court were to adopt the position urged by Petitioner, those vessels would be subject to OSHA's jurisdiction when they happened to be physically located within a state, would not be subject to OSHA's jurisdiction when on the high seas, and would always be subject to Coast Guard regulations as discussed above at pages 7 – 18.

> This would be, we think, a disastrous and unworkable rule: one that would require . . . vessels to paint all stumbling hazards yellow as they enter port, one that would forbid retaliation for complaints made to the Coast Guard in port but not for those made to it on the high seas, and so forth.

*Id. See also Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1243 (9th Cir. 1998) (acknowledging that "vessels operating on the high seas are certainly outside of the Act's coverage," but concluding that OSHA had jurisdiction under the facts of the case before it because "the waters involved here are by definition within the State of Alaska").[20]

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[20]The Ninth Circuit's decision not only glossed over the difficulties created by OSHA's limited geographic jurisdiction, it concluded that the Coast Guard had not exercised its jurisdiction, notwithstanding the Ninth Circuit's own lengthy description of Coast Guard regulation of uninspected tugs: "The Dr. Jack, however, is an uninspected vessel. While not subject to the regulations specific to inspected vessels, uninspected vessels are nonetheless subject to a number of Coast Guard safety-related regulations. In particular, 46 U.S.C. §§ 4101- 4106 and 46 C.F.R. pts. 24-28 deal specifically with uninspected vessels. Among other things, these provisions enumerate certain required safety equipment such as fire extinguishers, lifesaving equipment, emergency radio beacons, and ventilation for tanks and engine spaces. *See* 46 U.S.C. S 4102; 46 C.F.R. pt. 25.

"Uninspected vessels are also subject to other requirements generally applicable to the type of vessel they are. For example, the Dr. Jack is a "vessel of the United States" and a "towing vessel." *See* 46 U.S.C. §§ 2101(40), 2101(46). It is therefore

The Fifth Circuit did not need to concern itself with geographical jurisdiction because it found there was an industry-wide exemption, Pet. App. at 7a, and because Mallard Bay's drilling rig "was stationary and within the territorial boundaries of the State of Louisiana."[21] Accordingly, the record in this case does not support applying the OSH Act to all uninspected vessels, regardless of whether they regularly move in and out of OSHA's geographic jurisdiction. To accept Petitioner's invitation to apply the OSH Act

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subject to the seaworthiness provisions of 46 U.S.C. §§ 10901-10908. These provisions apply to the vessel's "crew, hull, equipment, tackle, machinery, apparel, furniture, [and] provisions of food or water." 46 U.S.C. § 10902(a)(1). The statutes create a means of quasi-self-regulation: members of the crew are empowered to initiate a court-supervised inspection of conditions they believe are unfit. *See id.* Three court-appointed marine surveyors complete this inspection, and the district court determines whether the vessel is fit for voyage. 46 U.S.C. § 10903. In addition, the doctrine of seaworthiness gives a private right of action to a seaman who is injured by equipment that is not fit for its intended use. Ribitzki v. Canmar Reading & Bates, Ltd., 111 F.3d 658, 664 (9th Cir.1997).

"Additionally, an uninspected vessel's status as a United States flag vessel may subject it to further regulation depending on the type of service in which it engages. Uninspected vessels may therefore be subject to Coast Guard regulations concerning load lines, marine engineering, electrical engineering, and dangerous cargoes. 46 C.F.R. ch. I, subchs. E, F, J, N. For example, as a towing vessel, the Dr. Jack is subject to the load line regulations. Not only are uninspected vessels subject to these specific and general regulations, in this case the entire crew was subject to licensing and certification. *See* 46 U.S.C. §§ 7101-7114; 46 C.F.R. pts. 10-16. The certification requirements for uninspected towing vessels prescribe that crew members be proficient in certain safety-related tasks such as fire fighting and first aid. *See* 46 C.F.R. § 10.203, Table 10.203. At the time the Secretary issued the citations in this case, the Dr. Jack was operating in Valdez, Alaska and was subject to inspection by the Coast Guard Marine Safety Office in Valdez for compliance with these and other general regulations." 160 F.3d at 1242-43.

[21] *Secretary of Labor v. Mallard Bay Drilling, Inc.* (OSHRC Docket No. 97-1973), reprinted at Pet. App. at 13a. Neither the Second Circuit in *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984) nor the Eleventh Circuit in *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986) considered the limited geographical scope of OSHA's jurisdiction.



to all uninspected vessels, including tugs operated by AWO members that regularly operate beyond state waters, would "produce an additional anomaly, that of steaming in and out of OSHA coverage." *Donovan v. Texaco,* 720 F.2d at 829.

### E. Employees on uninspected vessels of the types operated by AWO's members are protected by long-standing rules of substantive law that assure workplace safety, without OSHA regulation.

Petitioner asserts that unless OSHA regulates workplace safety on all uninspected vessels, "thousand of employees would be left without federal regulatory protection from workplace health and safety hazards," Pet. Brief at 14. Not only does Petitioner overlook the Coast Guard's comprehensive safety regulations discussed above,[22] Petitioner's assertion also ignores the fact that seamen on uninspected vessels of the types operated by AWO members are also protected by the warranty of seaworthiness and the Jones Act, 46 U.S.C. § 688.

In addition to the Coast Guard's workplace safety regulations, federal common law imposes on every shipowner an absolute duty to provide each seaman with a seaworthy vessel. If the seaman's workplace is not reasonably fit for its intended use and causes damage to the seaman, then the vessel is unseaworthy and the seaman has a claim against the vessel owner for tort damages, including pain and suffering, disability, loss of earnings and medical expenses. *Mahnich v. Southern Steamship Co.*, 321 U.S.96, 99 (1944) ("vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment").

Furthermore, the Jones Act applies the standards of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., to claims by

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[22] Petitioner states that "[t]he Coast Guard, however, does not have and has not exercised comprehensive authority over the working conditions on uninspected vessels." Pet. Brief at 11-12. *See also id.* at 23. The discussion at pages 7 – 18 above demonstrates that this assertion is clearly wrong.

injured seamen. Under the statutes, the employer "shall be liable in damages to any person suffering injury while he is employed by such [employer], . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such [employer.]" 45 U.S.C. § 51. *See generally Hopson v. Texaco*, 383 U.S. 262, 263 (1966) (Jones Act makes "employer liable for the injuries negligently inflicted on its employees by its officers, agents, or employees.")

Thus seamen on uninspected vessels are already protected by numerous legal doctrines. Contrary to the suggestions of Petitioner, declining to extend OSHA regulation to all uninspected vessels would not leave those employees unprotected. Rather, it would continue the historic role of courts and of the common law, together with the Coast Guard's comprehensive workplace safety regulations discussed above, as the primary guarantors of workplace safety on vessels, instead of injecting a federal administrative agency which does not have specialized knowledge of, or historical experience with, the dangers of the sea.[23]

### F. The result sought by Petitioner would treat all uninspected vessels as if they were the same, thus inappropriately creating an industry-wide non-exemption from OSHA regulation.

Petitioner criticizes the opinion below for utilizing an industry-wide exemption, but Petitioner's own approach would result in an industry-wide "non-exemption" for uninspected vessels. Petitioner argues that it was error to treat all vessels the same, regardless of whether they are inspected or uninspected. But Petitioner would treat all uninspected vessels the same, regardless of whether they are inland drilling rigs like Mallard Bay's or towing vessels operated by AWO's members subject to the Coast Guard safety regulations discussed above.

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[23] It is noteworthy that although OSHA asserts jurisdiction over all uninspected vessels, it was the Coast Guard, not OSHA that conducted the actual investigation of the explosion on Mallard Bay's drilling rig. *See* Pet. Brief at 6, Pet. App. 22a – 51a.



Petitioner relies heavily on the March 17, 1983 MOU between the Coast Guard and OSHA, emphasizing that "[n]othing in this MOU pertains to uninspected vessels." *Id.*, Pet. App. 62a. But saying that the MOU does not apply to uninspected vessels does not mean that the Coast Guard does not regulate uninspected vessels. The MOU does not disclaim Coast Guard jurisdiction over uninspected vessels nor does it cede to OSHA authority to regulate workplace safety on uninspected vessels. Rather the MOU has no effect whatsoever on uninspected vessels, and the Coast Guard has continued to regulate them, adopting or amending no less than fifteen of the regulations discussed at pages 7 – 18 above after the date of the MOU.

In sum, this Court should decline Petitioner's invitation to announce an industry-wide "non-exemption" from OSHA that is applicable to all uninspected vessels without regard to their differences and the differences in the nature and scope of the Coast Guard regulations that apply to them. The Coast Guard has exercised and continues to exercise its authority with respect to workplace safety on the uninspected vessels operated by AWO's members. It is the federal agency best suited to regulate vessels and the safety of the seamen who work aboard them. Overlapping regulation by OSHA will create the confusing, duplicative and potentially inconsistent regulatory structure that Congress sought to avoid.

## IV. CONCLUSION

The decision of the Fifth Circuit should be affirmed or, in the alternative, the case should be remanded for a hearing to determine whether the Coast Guard has exercised statutory authority with respect to the specific type of uninspected vessel involved in this case.

Respectfully submitted,

BARBARA L. HOLLAND
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*Attorneys for Amicus Curiae The American Waterways Operators*

June 8, 2001





U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 11, 2001

Also via telefax: 206-464-0125

Barbara L. Holland
Garvey, Schubert & Barer
Eighteenth Floor
Second & Seneca Building
1191 Second Avenue
Seattle, Washington 98101-2939

Re: Chao, Secretary of Labor v. Mallard Bay Drilling, No. 00-927

Dear Ms. Holland:

As requested in your letter of May 10, 2001, I hereby consent to the filing of a brief amicus curiae on behalf of the American Waterways Operators in the above-styled case.

Sincerely,

Barbara D. Underwood

Barbara D. Underwood
Acting Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

JONES WALKER

Patrick J. Veters
Direct Dial 504-582-8630
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May 14, 2001

**By Federal Express & Fax (206) 464-0125**
Ms. Barbara L. Holland
Garvey, Schubert & Barer
18th Floor, Second & Seneca Building
1191 Second Avenue
Seattle, Washington 98101

Re: Department of Labor vs. Mallard
Bay Drilling, Inc.
U.S. Supreme Court – No. 00-0927
Our File 79485-00

Dear Barbara:

Please be advised that on behalf of Mallard Bay Drilling, Inc., we consent to the filing of an amicus curiae brief on behalf of the American Waterways Operators in connection with the above matter.

We are forwarding to you by Federal Express today a copy of the Brief filed by the Petitioner, Elaine L. Chao, Secretary of Labor, and a copy of the amicus curiae brief filed on behalf of the American Trial Lawyers of America.

With best regards, I remain

Very truly yours,

Patrick J. Veters

PJV:dr
Encl.





**UNITED STATES COAST GUARD**

**AND**

**AMERICAN WATERWAYS OPERATORS**

**OUTLINE OF QUALITY PARTNERSHIP**

**FOR**

**MARINE SAFETY AND ENVIRONMENTAL PROTECTION**

**Purpose and Objective of the Quality Partnership**

1. The purpose of this quality partnership between the United States Coast Guard (USCG) and the American Waterways Operators (AWO) is to strengthen the communication and working relationship between the Coast Guard and the barge and towing industry. Its objectives, for both the USCG and AWO, are to improve vessel and personnel safety within the barge and towing industry and enhance the protection of the environment along our nation's waterways. These objectives have been identified as strategic goals within the Coast Guard's "M" Business Plan and Performance Plan under the Government Performance and Results Act (GPRA), and within AWO's strategic plan, *AWO 2000*.

**Outline of the Quality Partnership**

2. The quality partnership covered by this agreement is to establish a program of cooperative, informal, structured processes that will address issues of marine safety and environmental protection. These processes are not intended to subvert the legitimate role for government regulation in establishing minimum standards necessary to ensure the safety of U.S. waters, vessels and crews; nor are they intended to supplant the important role that has been and continues to be played by existing federal advisory committees to the Coast Guard (including the Towing Safety Advisory Committee, Chemical Transportation Advisory Committee, etc.). Rather, they are intended to complement these other legitimate government and industry functions by providing a flexible mechanism for joint Coast Guard-industry action in a results-oriented, non-regulatory environment.

**Details of the Quality Partnership**

3. The USCG and AWO agree to establish a quality partnership to further mutual goals of safety and environmental protection. This quality partnership involves creating national, regional and local Quality Steering Committees to review and act on "Opportunities for Improvement" (OFIs) received from members of the barge and towing industry, AWO, and USCG personnel. Quality Steering Committees (QSC) will identify these OFIs that are candidates for cooperative Coast Guard-industry attention and then set up Quality Action Teams (QATs) to correct the problem or improve the process identified in the OFI.

4. Quality Action Teams will operate under the guidance of the QSC and conduct their work using a quality process to analyze the issues involved and recommend process improvements including, as a minimum, the following steps:

a. Define the scope of the problem or process improvement needed (i.e., determine the base line), utilizing statistical data, case studies, etc., as available;

b. Analyze the data/identify root causes of the problem;

c. Identify solutions to the problem or improvements to the process based on analysis of available data/evidence;

d. Identify the measure(s) by which the success of proposed solutions will be judged and check the validity of the proposed solutions by measuring initial results;

e. Refine proposed solutions as necessary; and,

f. Develop an implementation plan (including identification of the target audience for the improvement) for submittal back to the Quality Steering Committee.

5. Quality Steering Committees will review the work of the QAT to ensure that all necessary quality steps have taken place, that proposed solutions and quality improvements are supported by the underlying analysis, and that the proposed implementation plan is complete and understandable. Having validated the QAT's work, the QSC will endorse the results and communicate proposed improvements to the target audience identified in the QAT's implementation plan.

**Action**

6. To institutionalize the quality partnership described above, the USCG and AWO agree to undertake the following actions:

a. Both the USCG and AWO will promote this Quality Partnership within our two organizations via appropriate channels.





b. The USCG and AWO will establish a National Quality Steering Committee by September 30, 1995.

c. The National QSC will establish by November 1, 1995, a National Quality Action Team (QAT) that initially will address the issue of deckhand fatalities.

d. The USCG and AWO will establish Regional Quality Steering Committees in the AWO Midcontinent and Southern Regions (Second and Eighth Coast Guard Districts) by October 1, 1995.

e. These Regional QSCs will identify by November 1, 1995, no more than two Captain of the Port Zones per Region for the establishment of Local QSCs.

f. The experiences gained by the National, Regional and Local QSCs in meeting the objectives of this quality partnership will be evaluated by the National QSC after one year's operation. Based on this evaluation, the National QSC will recommend to the USCG and AWO whether to continue and/or expand the quality partnership.

g. If a favorable recommendation is received to continue and/or expand the quality partnership, the USCG and AWO will expand the above described processes to the remainder of the AWO Regions and Coast Guard Districts and Captain of the Port Zones.

**Institution of the Quality Partnership**

7. This Outline of Quality Partnership is effective upon signature of this agreement. It is informal in nature and may be modified or terminated by either party by mutual agreement at any time.

J. C. Card
Rear Admiral, U. S. Coast Guard
Chief, Office of Marine Safety, Security and Environmental Protection

September 19, 1995
Date

Thomas A. Allegretti
President
American Waterways Operators

September 19, 1995
Date

U.S. Department of Transportation
United States Coast Guard

Commander (m)
Eighth Coast Guard District

501 Magazine St.
New Orleans, LA 70130-3396
Phone: (504) 589-6743

CCGD8INST 16710.1
JAN 21 1997

EIGHTH DISTRICT INSTRUCTION 16710.1

Subj: COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

1. PURPOSE. This instruction promulgates policy for implementing the cooperative towing vessel examination program (CTVEP).

2. DISCUSSION. Commercial towing vessel safety is enhanced through this cooperative effort between industry and the Coast Guard. This program allows the Coast Guard to maximize the use of its resources by concentrating its enforcement activities on higher risk vessels.

3. PROCEDURE.

a. Program entry and voluntary examinations.

(1) Companies that operate towing vessels should apply in writing to one of the participating marine safety offices (MSOs) for entry into the CTVEP. MSOs that participate in the program will act as sponsors to companies and will function as a company's point of contact in all matters relating to the program. Scheduling of examinations is based on the availability of the sponsoring MSO's resources. The CTVEP consists of two phases. Phase I involves an annual examination of a company's towing vessels by Coast Guard personnel and Coast Guard issuance of a decal. Phase II is granted to companies that meet suggested guidelines for marine management and ship operations based on the requirements of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), the American Waterways Operators Responsible Carrier Program, or an equivalent quality system. The company must also undergo a verification of their quality program by the Coast Guard.

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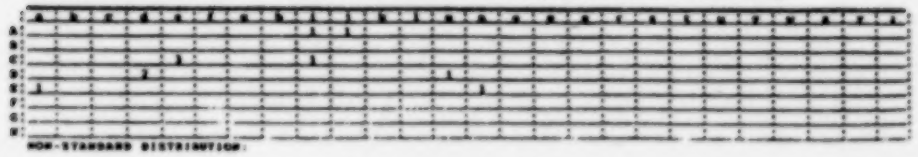

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SUBJ: COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

3. a. (2) For Phase I companies, the initial vessel examination will be conducted by a qualified Coast Guard examiner. After passing the exam, the vessel will be issued a decal that demononstrates compliance with the regulations. These examinations will be conducted with the understanding that the Coast Guard will not initiate civil penalty action for deficiencies discovered during the examination. Voluntary examinations without penalties are a cornerstone of this program. Discovery of an especially hazardous condition that threatens the safety of the vessel, its crew or the environment will require that the condition be corrected immediately.

(3) For Phase II companies, quality verifications and prescribed vessel examinations will be conducted by qualified Coast Guard examiners. Once a quality verification is completed, a number of company vessels will be examined by the Coast Guard. Although the exact number of vessels to be examined will be determined by the cognizant MSO in conjunction with the company representative, this should normally be no less than ten percent of the operating fleet. Following successful completion of the vessel examinations, the company is granted Phase II designation, which authorizes it to issue decals to its own vessels. Phase II companies will undergo an annual quality verification by the Coast Guard, which will include examination of a number of the company's vessels.

(4) Enclosure (1) contains all the information needed to implement this program. It provides a summary of the CTVEP, an explanation of program administration, and a quality verification checklist that is suggested for use to verify a company's quality program during a Phase II quality verification exam. It also contains a towing vessel boarding form and a list of applicable towing vessel safety requirements.

3. b. Unscheduled boardings.

(1) Commercial towing vessels with current decals will not normally be subject to boardings unless they are involved in a pollution incident, a marine casualty or when the boarding is part of a Coast Guard law enforcement operation. Marine safety units shall use the boarding form in enclosure (1) for all boardings. All other units shall use the CG 4100 form to document boardings. A copy of the boarding form or 4100 form shall be mailed to the sponsoring MSO, by the boarding unit, within five work days of the boarding.

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SUBJ: COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

3. b. (2) Unscheduled boardings of "decaled" towboats shall normally be limited to a check of principal lifesaving and firefighting equipment, as well as personnel licenses and documents. If an especially hazardous condition is discovered aboard a "decaled" towing vessel during an unscheduled boarding, the boarding unit shall take all actions necessary to ensure the safety of the vessel, its crew and the environment. These steps could include immediate correction of the condition or termination of the vessel's voyage. Sponsoring MSOs shall review all boarding forms or 4100 forms received from boarding units and take appropriate action to ensure that deficiencies are corrected within an acceptable time frame, which, in most cases, will be within 30 days from discovery.

(3) Commercial towing vessels without a decal will continue to be subject to random unscheduled boardings. Regardless of the outcome of an unscheduled boarding, the boarding team shall encourage participation in the CTVEP by providing the vessel operator a copy of either enclosure (2) or (3). Vessels from companies that do not participate in the CTVEP are <u>not</u> eligible to be issued a decal as a result of an unscheduled boarding.

4. <u>ACTION</u>.

a. Effective upon the date of this instruction, the following personnel shall take the actions specified:

(1) CCGD8(m) is responsible for program management and oversight and shall ensure that the CTVEP is carried out consistently.

(2) CCGD8(o) shall provide copies of this instruction to all groups, stations, WPBs, and visiting cutters and shall ensure that unscheduled boardings on "decaled" vessels are limited in scope as described in this instruction.

(3) Commanding officers of MSOs and MSU Galveston are responsible for implementation of the program. Units choosing not to fully implement this program, due to resource constraints or other higher risk priorities, shall conduct familiarization training for vessel boarding personnel. They shall also honor decals issued by other units and use the boarding form in enclosure (1) for all unscheduled towing vessel boardings.





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4. a. (4) Commanding officers of groups and WPBs shall ensure that boardings of towing vessels are conducted in accordance with paragraph three of this instruction.

T. W. JOSIAH

Encl: (1) Eighth Coast Guard District Cooperative Towboat Examination Program
(2) Boarding Officer letter citing deficiencies
(3) Boarding Officer letter citing no deficiencies

U.S. Department of Transportation
United States Coast Guard

Commander
8th Coast Guard District
Hale Boggs Federal Bldg

501 Magazine Street
New Orleans, LA 70130-3396
Staff Symbol: (mec)
Phone: (504) 589-6743
Fax 589-4999

Dear Captain:

Your vessel was boarded to check for compliance with federal laws and regulations. The attached boarding report lists violations that provide for assessment of significant civil penalties. The Coast Guard will waive these penalties if, within the next 30 days, you:

1) Correct all of the deficiencies noted on the boarding report.

2) Contact any of the below listed Coast Guard Offices and initiate the actions to begin participation in the cooperative towing vessel examination program.

| | |
|---|---|
| Marine Safety Office Corpus Christi, TX | (512) 888-3181 |
| Marine Safety Unit Galveston, TX | (409) 766-3642 |
| Marine Safety Office Houston-Galveston, TX | (713) 671-5180 |
| Marine Safety Office Huntington, WV | (304) 529-5524 |
| Marine Safety Office Louisville, KY | (502) 582-5194 |
| Marine Safety Office Memphis, TN | (901) 544-3941 |
| Marine Safety Office Mobile, AL | (334) 441-5203 |
| Marine Safety Office Morgan City, LA | (504) 384-2406 |
| Marine Safety Office New Orleans, LA | (504) 589-6273 |
| Marine Safety Office Paducah, KY | (502) 442-1621 |
| Marine Safety Office Pittsburgh, PA | (412) 644-5808 |
| Marine Safety Office Port Arthur, TX | (409) 723-6509 |
| Marine Safety Office St. Louis, MO | (314) 539-3091 |

The goal of this penalty waiver program is to allow vessel owners the opportunity to use funds that would go to a civil penalty to bring their vessels into compliance with all safety requirements.

In addition to having a safer vessel, enrollment in the cooperative towing vessel examination program should further benefit you by resulting in less frequent and less time consuming boardings by the Coast Guard.

Failure to take advantage of the cooperative towing vessel examination program penalty waiver provision within 30 days will result in initiation of civil penalty proceedings.



U.S. Department of Transportation
United States Coast Guard

Commander
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501 Magazine Street
New Orleans, LA 70130-3396
Staff Symbol: (mec)
Phone: (504) 589-6743
Fax 589-4999

Dear Captain:

Your vessel was boarded to check for compliance with federal laws and regulations and no deficiencies were noted.

The condition of your vessel makes it a good candidate for our cooperative towing vessel examination program. This program will improve the safety of your vessel and will result in less frequent and less time consuming boardings by the Coast Guard. Participation in this program may be initiated by contacting any of the following Coast Guard Eighth District offices:

| | |
|---|---|
| Marine Safety Office Corpus Christi, TX | (512) 888-3181 |
| Marine Safety Unit Galveston, TX | (409) 766-3642 |
| Marine Safety Office Houston-Galveston, TX | (713) 671-5180 |
| Marine Safety Office Huntington, WV | (304) 529-5524 |
| Marine Safety Office Louisville, KY | (502) 582-5194 |
| Marine Safety Office Memphis, TN | (901) 544-3941 |
| Marine Safety Office Mobile, AL | (334) 441-5203 |
| Marine Safety Office Morgan City, LA | (504) 384-2406 |
| Marine Safety Office New Orleans, LA | (504) 589-6273 |
| Marine Safety Office Paducah, KY | (502) 442-1621 |
| Marine Safety Office Pittsburgh, PA | (412) 644-5808 |
| Marine Safety Office Port Arthur, TX | (409) 723-6509 |
| Marine Safety Office St. Louis, MO | (314) 539-3091 |

*Eighth Coast Guard District*

# *Cooperative Towing Vessel Examination Program*

21 JAN 97



# EIGHTH COAST GUARD DISTRICT COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

## PROGRAM SUMMARY

## Program Summary

### Overview

The Eighth District's Cooperative Towing Vessel Examination Program (CTVEP) is a voluntary program developed with industry to enhance safety on fleet and line boats. It is designed to reward companies that have shown a commitment to quality and it allows for more efficient use of Coast Guard and industry resources.

Historically, the Coast Guard conducted unscheduled boardings to ensure that commercial operators complied with applicable U.S. laws and regulations. Penalties were assessed for deficiencies identified. Working with the industry, the Coast Guard became convinced that there is a better way to enhance safety on fleet and line boats. It is believed that a higher level of safety and a more efficient use of resources will be assured through a cooperative voluntary dockside examination program. This is the basis on which the CTVEP was founded.

### The Cooperative Towing Vessel Examination Program

The CTVEP greatly reduces unscheduled boardings for participating companies and provides an opportunity to correct deficiencies without penalty. A company must apply via letter to the commanding officer of the cognizant Marine Safety Office for entry into the program. The program consists of two phases:

Phase I - Vessel Exam: Companies will schedule annual examinations with the Coast Guard which will be conducted using a joint MSO-industry examination checklist. Companies will be provided thirty days to correct all but the most critical discrepancies, which must be corrected immediately. No penalties will be assessed as a result of these examinations. Once discrepancies are corrected, the vessel will be issued a decal for display in the wheelhouse. This decal will ensure that the vessel is subject to no unnecessary examinations in the Eighth Coast Guard District for the period of one year. The decal will be honored by all Eighth District Coast Guard Units.

Phase II - Quality Verification Exam: Companies may enter Phase II of the Cooperative Towing Vessel Examination Program if they use an approved quality program to manage their vessel operations. Approved programs include the suggested guidelines for marine management and ship operation based upon the requirements of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), the AWO Responsible



Carrier Program, or any other equivalent quality management program approved by the cognizant MSO. Participation in Phase II of the program allows the company to issue its own decals. Entry into Phase II requires two steps. First the company must complete a quality verification examination by the Coast Guard. During this exam, the Coast Guard will use the principles of the "AWO Responsible Carrier Program" as a guide. Following a successful exam, the second step of Phase II will include the examination of a percentage of the company's towing vessel fleet. The number of vessels examined will be determined by the cognizant MSO, but shall normally be no less than ten percent of a company's fleet. In making the percentage determination, the MSO should work closely with the company's quality representative, and consider the overall quality of the company, the operating area of its vessels and the total number and variety of towing vessels within the company's fleet. The goal of the Phase II program is to allow the Coast Guard to observe, through scheduled examinations, that the company's quality program is fully in place aboard its vessels. Companies that fail to meet the Coast Guard standard for either the quality verification exam (Phase II) or the vessel exam (Phase I) will be provided written notice of the discrepancies. The company will then be allowed to correct the deficiencies and request another Phase II examination. Companies failing the Phase II examination may opt to forego Phase II designation and choose to enroll in the Phase I program. It is also expected that many companies will transition from Phase I to Phase II over a period of time.

This program provides numerous benefits to both the Coast Guard and the participating companies.

### Coast Guard Benefits

1) Greater emphasis on prevention and quality systems.

2) More effective use of resources.

3) Better focus on high risk vessels.

4) Increased industry cooperation.

5) Provides CG/Industry contact at "deck plate" level.

### Company Benefits

1) Voluntary program. Participation is at company's discretion.

2) Provides for scheduling of examinations more compatible with operations.

3) Focuses on education and correction of deficiencies, not penalties.

4) Eliminates repeat or multiple boardings and minimizes examination time.

5) Standardizes examinations.

6) Offers a natural progression to self-inspection using existing modal company concepts such as AWO's Responsible Carrier Program.

Noncompliance

Participation in the CTVEP and display of either a Phase I or Phase II decal will preclude unnecessary unscheduled vessel boardings by Eighth District units. Boardings subsequent to a pollution incident or marine casualty will continue as will boardings that are necessary in the interest of safety, environmental protection, or the enforcement of law or regulation. Boarding units will report all discrepancies found to the MSO that issued the vessel's decal by forwarding a copy of the boarding form or 4100 form within five work days of the boarding. For an especially hazardous condition that threatens the safety of the vessel, its crew, or the environment, the boarding unit may require that the condition be corrected immediately. In these circumstances the decal-issuing MSO shall be notified immediately by the boarding unit. Additionally, depending on the nature of the discrepancies and the circumstances of the incident, civil penalty action may be initiated by the boarding unit.

Upon receipt of a boarding report that shows deficiencies, the decal issuing MSO will contact the vessel's owner and/or operator and grant up to thirty days to correct any deficiencies noted. If, after thirty days, the owner and/or operator has not corrected the deficiencies to the satisfaction of the MSO, the vessel's company will either be reverted back to Phase I or entirely withdrawn from the CTVEP. In all cases where the discrepancy hazarded the vessel or its crew, the sponsoring MSO shall investigate the matter to determine the reason for the failure of the company's quality program. If this investigation reveals a lack of commitment to safety by company management, action shall be taken to remove the company from the CTVEP.



Scheduling

Requests for vessel examinations or company enrollments shall be forwarded to any of the following Coast Guard offices:

U.S. Coast Guard MSO St. Louis
Attn: Chief of Port Operations
Suite 8.104E, 1222 Spruce Street
St. Louis, MO 63103-2835
(314) 539-3091

U.S. Coast Guard MSD Quad Cities
Attn: Supervisor
Rock Island Arsenal, Bldg. 218
Rock Island, IL 61204-3220
(309) 782-0627

U.S. Coast Guard MSD Nashville
Attn: Supervisor
Suite 146, 220 Great Circle Road
Nashville, TN 37228-1700
(615) 736-5421

U.S. Coast Guard MSD Cincinnati
Attn: Supervisor
3653 River Road
Cincinnati, OH 45204-1094
(513) 921-9033

U.S. Coast Guard MSO Huntington
Attn: Chief of Port Operations
1415 Sixth Avenue
Huntington, WV 25701-2420
(304) 529-5524

U.S. Coast Guard MSD Greenville
Attn: Supervisor
1801 Industrial Park Road
P.O. Box 882
Greenville, MS 38701-9586
(601) 332-0964

U.S. Coast Guard MSSO Port Lavaca
Attn: Supervisor
225 No. Virginia, Suite 2B
Port Lavaca, TX 77979
(512) 552-7422

U.S. Coast Guard MSO Houston-Galveston
Attn: Commanding Officer
P.O. Box 446
Galena Park, TX 77547
(713) 671-5199

U.S. Coast Guard MSD St. Paul
Attn: Supervisor
P.O. Box 65428, 180 E. Kellog Blvd.
St. Paul, MN 55165-0428
(612) 290-3991

U.S. Coast Guard MSO Paducah
Attn: Chief of Port Operations
225 Tully Street
Paducah, KY 42003-1582
(502) 442-1621

U.S. Coast Guard MSO Louisville
Attn: Chief of Port Operations
600 Martin Luther King, Jr. Room 360
Louisville, KY 40202-2230
(502) 582-5194

U.S. Coast Guard MSO Pittsburgh
Attn: Chief of Port Operations
100 Forbes Ave., Kossman Bldg.
Pittsburgh, PA 15222-1371
(412) 644-5808

U.S. Coast Guard MSO Memphis
Attn: Chief of Port Operations
200 Jefferson Ave., Suite 1301
Memphis, TN 38101-2300
(901) 544-3941

U.S. Coast Guard MSO Corpus Christi
Attn: Commanding Officer
400 Mann Street, Suite 210
Corpus Christi, TX 78401
(512) 888-3177

U.S. Coast Guard MSSO Brownsville
Attn: Supervisor
3505 Boca Chica Blvd., #301
Brownsville, TX 78521
(210) 546-2786

U.S. Coast Guard MSD Helena
Attn: Supervisor
617 Walnut Street, Room 204
Helena, AR 72342-3231
(504) 338-8790

U.S. Coast Guard MSO Mobile
Attn: Commanding Officer
150 No. Royal, P.O. Box 2924
Mobile, AL 36602-3922
(334) 441-5201

U.S. Coast Guard MSO Morgan City
Attn: Commanding Officer
800 David Drive, Room 200
Morgan City, LA 70380
(504) 384-2406

U.S. Coast Guard MSFO Galliano
Attn: Supervisor
c/o MSD Houma
425 Lafayette Street, Room 204
Houma, LA 70360
(504) 632-8675

U.S. Coast Guard MSO New Orleans
Attn: Commanding Officer
1615 Poydras Street
New Orleans, LA 70112
(504) 589-6196

U.S. Coast Guard MSO Port Arthur
Attn: Commanding Officer
2875 Jimmy Johnson Boulevard
Port Arthur, TX 77640
(409) 723-6513

U.S. Coast Guard MID Jennings
c/o Leevac Shipyard
P.O. Box 1190
Jennings, LA 70546
(318) 824-6968

U.S. Coast Guard DMI LaCrescent
Attn: Supervisor
1114 South Oak Street
LaCrescent, MN 55947
(507) 895-6341

U.S. Coast Guard MSD Panama City
Attn: Supervisor
P.O. Box 32043
Panama City, FL 32407-8043
(904) 233-0386

U.S. Coast Guard MSD Houma
Attn: Supervisor
425 Lafayette Street, Room 204
Houma, LA 70360
(504) 868-5595

U.S. Coast Guard MSFO Lafayette
Attn: Supervisor
#3 Flagg Place, Suite A6
Lafayette, LA 70508
(318) 988-8220

U.S. Coast Guard MSD Baton Rouge
Attn: Supervisor
640 Main Street, Suite 103
Baton Rouge, LA 70801
(504) 389-0271

U.S. Coast Guard MSD Lake Charles
Attn: Supervisor
150 Marine Street, Box #4
Lake Charles, LA 70601
(318) 433-3765

U.S. Coast Guard DMI Peoria
Attn: Supervisor
Foot of Washington Street
East Peoria, IL 61611
(309) 694-7779

U.S. Coast Guard MSU Galveston
Attn: Commanding Officer
601 Rosenburg, Room 309
Galveston, TX 77550-1705
(409) 766-3655



# EIGHTH COAST GUARD DISTRICT COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

## GLOSSARY OF TERMS, ROLES, RESPONSIBILITIES AND ADMINISTRATIVE PROCEDURES

## Glossary of Terms, Roles, Responsibilities and Administrative Procedures

### Glossary of Terms

The following are terms found within the Cooperative Towing Vessel Examination Program:

1. **Sponsoring MSO**: An MSO that will be responsible for program coordination and issuance of decals. This will include receiving written requests for participation, processing the requests, providing information, and establishing a sponsorship agreement. For Phase I participants, the sponsoring MSO will conduct vessel exams and arrange with other MSO's for examinations requested outside the sponsoring MSO zone. For Phase II participants, the sponsoring MSO will conduct a quality verification examination of a company's quality program. Once the quality verification exam is completed, the sponsoring MSO will meet with the company's representative to establish the percentage of vessels to examine. The sponsoring MSO is a quality partner of the company and will provide feedback on a company's vessels and/or quality programs. Additionally, the sponsoring MSO will seek feedback from the company on processes improvements that would be useful to enhance the Cooperative Towing Vessel Examination Program.

2. **Sponsorship Agreement**: An agreement between the sponsoring MSO and a company which outlines scheduling, administrative procedures and examinations for enrollment in either Phase I or Phase II.

3. **Quality Verification Examination**: A review conducted by the Coast Guard on the quality program of companies wishing to earn Phase II designation. The quality verification examination is done to assess the overall scope of a company's quality program. After completion of the quality verification examination the sponsoring MSO will meet with the company to discuss the company's quality program. If the sponsoring MSO is satisfied with a company's quality program they will initiate examination of a number of the company's vessels. This number will be discussed between the sponsoring MSO and the company representative.

4. **Unscheduled Boarding:** Boardings conducted on towing vessels by Coast Guard personnel without prior notice to the company. Unscheduled boardings would not occur on any decaled towing vessel within the Eighth District unless it is involved in a pollution incident, a marine casualty, or when a boarding is necessary in the interest of safety, environmental protection or the enforcement of law or regulation.

5. **Scheduled Examinations:** Examinations conducted on towing vessels by Coast Guard personnel with prior notice to the company. Scheduled examinations are arranged with the company's sponsoring MSO. Scheduled examinations will be conducted with the expressed understanding that a civil penalty will not be levied against a vessel owner for items discovered to be missing, not working, etc. Scheduled examinations are done to determine if the towing vessel meets the applicable



regulations. Scheduled examinations are conducted for both Phase I and Phase II companies. If a Phase I company's vessel meets the applicable regulations the Coast Guard examiner will apply a decal to that vessel. If a Phase II vessel meets the requirements, the Coast Guard examiner will not apply a decal to that vessel. However, if all of the company's vessels examined by the Coast Guard are in compliance with the regulations, the company will be allowed to issue their own decals. If a serious deficiency is found during a scheduled examination, the vessel should not be allowed to leave until the deficiencies are corrected.

### Roles and Responsibilities

**Commander Eighth Coast Guard District**: The Commander Eighth Coast Guard District, through the Chief of the Marine Safety Division will be responsible for establishing program policy, and coordinating the efforts of the "M" and "O" boarding programs. The Chief of the Marine Safety Division will also be responsible for establishing program measurement requirements, and for general program administration and coordination. This will include bulk procurement of program information and Phase I and Phase II decals and dispensing this information and blocks of decals to MSO's who sponsor companies (coordinate company participation). The Chief of the Operations Division shall ensure all unscheduled towing vessel boardings are conducted using the boarding form developed as part of this program.

**Commanding Officers of Sponsoring MSO's**: These Commanding Officers will be responsible for program coordination and issuance of decals. This will include receiving written requests for participation, processing the requests, providing information, and establishing a sponsorship agreement. This agreement should be in writing and should detail the level of participation (Phase I or II), and number of examinations that will be conducted. The Sponsoring MSO should also coordinate with other MSO's for examinations requested and decals issued outside the sponsoring MSO zone. Commanding Officers of sponsoring MSO's will also be responsible for honoring decals and sponsorship agreements of other sponsoring MSO's as discussed below.

**Commanding Officers of Non-Sponsoring MSO's**: These Commanding Officers will be responsible for honoring decals and sponsorship agreements of sponsoring MSO's, except when a pollution incident or marine casualty occurs, or when a boarding is necessary in the interest of safety, environmental protection, or law or treaty enforcement. In addition, non-sponsoring MSO's will be responsible for ensuring consistency by using the boarding form developed as part of this program.

**Commanding Officers of Operational Units**: These Commanding Officers will be responsible for honoring decals issued by sponsoring MSO's, except in those cases when a pollution incident or marine casualty occurs, or when a boarding is necessary in the interest of safety, environmental protection, or law or treaty enforcement (this generally applies to non-river law enforcement operations). The standard 4100 Boarding Form will be used by Operational Units to document their boardings of UTVs. The 4100's should be forwarded to the Eighth District's 4100 Processing Center, whereupon civil penalty procedures will be initiated.

**Participating Marine Industry Personnel**: These personnel will be responsible for requesting entry into the program, assisting in development of the sponsorship agreement, and working with the sponsoring MSO's to schedule examination of their towing vessels. The marine industry will also be responsible for maintaining the condition of their equipment and their commitment to quality.

**All Participants**: All participants will be responsible for continuous evaluation and program feedback. In particular the sponsorship agreement constitutes a contract between the MSO and the company to continually improve their relationship and their joint commitment to safety.

## Administrative Procedures

**Program Entry**: Companies desiring to participate shall forward a written request to the Marine Safety Office that is responsible for the area that their company headquarters is located. If the company headquarters is located in a non-sponsoring MSO zone, or where the MSO has insufficient manpower to conduct examinations, the company may request sponsorship from any sponsoring MSO in their area of operations. Companies requesting Phase II participation must have an office located in a sponsoring MSO's zone in order to facilitate the required Phase II company quality verification exams.

**Phase I or Phase II**: Companies must indicate in their request whether Phase I or Phase II participation is requested and receive approval from the sponsoring MSO in writing (sponsorship agreement). If Phase I approval is granted examinations of each company vessel will be conducted and decals will be issued to vessels at the completion of successful examinations. If Phase II participation is requested the MSO will conduct a quality verification exam to assess the company's safety, maintenance, and quality programs. Upon completion of this quality verification exam the MSO will determine the number or percentage of examinations of towing vessels to verify the implementation of the safety and quality programs. This number will normally be no less than ten percent of the company's operating fleet. When these examinations are completed decals will be issued to the company by the sponsoring MSO (different in color than the Phase I decals) for issuance to their vessels. Blocks of decals will be provided to all sponsoring MSO's by MSO St. Louis.

**Boardings, Boarding Forms and Decal Application**: Boarding procedures are standardized for all towing vessels operating in the Eighth Coast Guard District and therefore will be the same for participating and non-participating vessels. Decals will not be issued to vessels from companies who have not requested program participation. The boarding form developed for this program will be used by Marine Safety units for all scheduled and unscheduled boardings. To ensure consistency, additions or deletions shall not be made to the form. Operational units should use the standard 4100 boarding form as described on the previous page when conducting boardings. Decals issued to both Phase I and Phase II vessels must be applied to the port side pilothouse window on all vessels. Decals may be issued to vessels by the non-sponsoring MSO. This should only be done with the agreement of the sponsoring MSO, and a copy of the boarding form must be forwarded for their review.





**Unsuccessful Examinations or Examinations Where Serious Deficiencies are Identified**: For initial examinations the focus should clearly be on correction of deficiencies as opposed to penalties. Deficiencies found during the initial phase I exam shall be brought to the company's attention and corrected within 30 days. Once the defects are corrected a decal should be issued. However, the company will need to reapply to the sponsoring MSO for re-entry into the Cooperative Towing Vessel Examination Program if after 30 days the defects remain uncorrected. Vessels shall not be allowed to get underway if deficiencies are discovered which effects the vessel's seaworthiness, pollution prevention or safety. For initial examination of Phase II vessels the same correction period and restrictions apply. For random boardings or boardings associated with a casualty or pollution case, normal penalty procedures should be followed. In addition, a copy of the boarding report should be sent to the sponsoring MSO. In cases where serious problems which hazard the vessel or crew are identified, the sponsoring MSO shall investigate the problem to determine if disenrollment from the program is warranted.

**Removal of decals, serious vessel problems, and disenrollment from the program**: The sponsoring MSO can disenroll a company from either Phase I or Phase II of the Cooperative Towing Vessel Examination Program if a company breaks its commitment to quality. This is a serious step and will only be used in those cases were a company's vessels have been involved in a particularly serious incident or a pattern of incidents which reflect poor quality practices. Groundings, collisions, bridge allisions, breakaways, oil spills and injuries or deaths are just a few examples of the types of incidents that may be indicative of poor quality practices. Disenrollment from either Phase I or Phase II will be determined solely by the sponsoring MSO. The sponsoring MSO will inform the company in writing that it is being disenrolled and why. The company will be required to remove all of its vessels' decals once disenrolled and return any unused decals (if a Phase II company) to the sponsoring MSO. The sponsoring MSO will suspend the company from re-entry into the Cooperative Towing Vessel Examination Program until the company has proven it has taken action to correct its process problems. The sponsoring MSO will work closely with the company to assist in identifying and correcting its quality problems. To re-enter the program the suspended company must re-apply to it's original sponsoring MSO.

**Annual Re-application**: Companies enrolled in either Phase I or Phase II of the Cooperative Towing Vessel Examination Program must annually notify their sponsoring MSO to schedule the appropriate examinations. Once the request is received, the same process used for initial Phase I or Phase II entry will be used by the sponsoring MSOs.

# EIGHTH COAST GUARD DISTRICT COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

## QUALITY VERIFICATION CHECKLIST



## Quality Verification Check List

**The following is a suggested approach to examining a company's quality program. It includes items that a COTP may want to review to during the Phase II quality verification examination. Sponsoring MSO's may want to add or subtract from this list to meet their needs.**

**A.) VESSEL OPERATING PROCEDURES**

1. Does the company have company specific vessel operating procedures?
2. Are there vessel specific operating procedures?
3. Are there procedures which ensure proper and valid documents are carried aboard the vessels?
4. Is there a list the documents which must be carried on board ?
5. Are fuel transfer procedures documented?
6. Are vessel maintenance procedures documented, including, at a minimum:
   - When maintenance is to be performed on equipment
   - Who is to perform the maintenance
   - The qualifications and training requirements for the persons responsible for maintenance
   - Procedures to correct deficiencies identified during maintenance
   - A maintenance documentation program
7. Are there procedures for inspecting the vessels, including at a minimum:
   - Persons responsible for conducting in-house inspections
   - Frequency of inspections
   - Qualifications and training required for persons responsible for conducting in-house inspections
   - Procedures to correct deficiencies found during inspections
   - Inspection record retention program
8. Are there cargo transfer and cargo handling procedures (if applicable) including, at a minimum:
   - Benzene policies
   - Vapor control policies
   - Cargoes requiring special handling
   - Lightering procedures (where applicable)

**B.) SAFETY POLICY/PROCEDURES**

1. Is there a company safety policy and is understood by the employees?

2. Is there a set of specific safety rules?

3. Is there personal protective gear which includes, at a minimum:
   - Usage instructions
   - Inspection procedures
   - Maintenance procedures
   - Replacement schedules

4. Are there procedures for safety and training drills?

5. Is there a safety training plan with a list of topics to be covered?

6. Are there scheduling and frequency procedures for safety and training drills?

7. Are there procedures for the documentation of safety and training drills?

8. Are there procedures for the safe use of vessel equipment such as rigging, deck machinery?

9. Are there procedures for the crew to be aware of the cargo they are carrying and it's possible hazards?

**C.) ENVIRONMENTAL POLICY/PROCEDURES**

1. Is there a company environmental policy?

2. Are there procedures for garbage disposal?

3. Are there procedures for proper handling of waste oil, bilge slops and used oil filters?

4. Are there procedures for the handling and disposal of hazardous waste?

5 Are there procedures for the proper use and maintenance of the marine sanitation equipment?

**D.) INCIDENT REPORTING AND EMERGENCY RESPONSE PROCEDURES**

1. Are there procedures for whom to contact after a marine casualty , specifically for:
   - Personal injuries
   - Deaths
   - Oil spills
   - Hazardous substance spills
   - Bridge or lock allisions
   - Collisions with other vessels





   - Groundings

2. Are there procedures for the proper completion of CG 2692 "Report of Marine Casualty or Personnel Injury"?

3. Are there procedures for responding to:
   - Personnel injuries?
   - Oil or hazardous substance spill?
   - Vessel damage due to fire or flooding?

**E.) INTERNAL AUDIT AND REVIEW PROCEDURES**

1. Are there procedures to examine the cause of a personnel accident which result in injury?

2. Are there procedures to examine causes of an oil spill or a hazardous material discharge?

3. Are there procedures to examine the causes of a vessel accident?

4. Are there communication procedures established to disseminate lessons learned from accidents, oil spills and injuries?

5. Are there procedures to establish safety measures to correct hazards or process problems which contributed to an oil spill, an accident or an injury?

**F.) PERSONNEL POLICIES**

1. Are there procedures which explain the company's and the Coast Guard's drug and alcohol programs?

2. Are there procedures for the orientation of new employees?

3. Are there training procedures which specifically outline:
   - Who is to be trained
   - The subjects in which training is given
   - The frequency of training

# EIGHTH COAST GUARD DISTRICT
# COOPERATIVE TOWING VESSEL
# EXAMINATION PROGRAM

## TOWING VESSEL BOARDING FORM



## EIGHTH COAST GUARD DISTRICT
## TOWING VESSEL BOARDING FORM

Vessel Name_____ Official No._____ Call Sign_____

Home Port_____Length_____Tot. Horse Pwr_____ No. of Eng____

Gross Tons_____ Net Tons_____ Year Built_____

Route: Inland_____Coastal_____Ocean____

Owner Address

_____

_____

_____

_____

Operator Address

_____

_____

_____

_____

### A. Required Markings & Documents:

| Item | Requirement | Regulation |
|---|---|---|
| 1. | O Official number clearly visible on interior structural part of hull? | 46 CFR 67.121 |
| 2. | O Original Marine Document produced if at least 5 net tons? Expires:_____ | 46 CFR 67.161(a) |
| 3. | O Name and hailing port clearly displayed | 46 CFR 67.123(a) |
| 4. | O Valid radio station license? | 47 CFR 80.25 |
| 5. | O Vessel log of required tests and inspections? | 33 CFR 164.80(b) |
| 6. | O Operator license? | 46 CFR 15.810 |
| 7. | O Restricted radio operator's license? | 33 CFR 164.72(a)(3) |

### B. Lifesaving Equipment:

| | | |
|---|---|---|
| 1 | O Serviceable CG approved PFD's for each person aboard | 46 CFR 25.25-5 |
| | _ All lifesaving equipment marked showing CG approval numbers | 46 CFR 25.25-7 |
| | _ Wearable lifesaving equipment readily accessible | 46 CFR 25.25-9(a) |
| | _ Work vests CG approved? (CG approval # 160.053 & 160.064) | 46 CFR 26.30-05 |

## TOWING VESSEL BOARDING FORM

| Item | Requirement | Regulation |
|---|---|---|

**B. Lifesaving Equipment Cont'd:**

| | | |
|---|---|---|
| | _ Work vests stowed separately from life preservers | 46 CFR 26.30-10 |
| | _ Retroreflective material for each PFD, Buoyant vest, or marine buoyant vest | 46 CFR 25.25-15 |
| 2. O | Ring buoy ( > 20'), one (1) CG approval # 160.050 | 46 CFR 25.25-5(d) |
| | _ Throwable lifesaving equipment immediately available | 46 CFR 25.25-9(b) |
| | _ EPIRB (High ocean low vessels only) | 46 CFR 25.26-20 |

**C. Navigation Safety:**

| | | |
|---|---|---|
| 1. O | Navigation Publications. (see explanation in the July 3, 1998 Final Rule) | |
| | _ Marine Charts of the area to be transited (Currently Corrected) | 33 CFR 164.72(b)(1) |
| | _ Coast Guard Light List | 33 CFR 164.72(b)(3) |
| | _ Coast Guard Local Notice to Mariners | 33 CFR 164.72(b)(3) |
| | _ US Coast Pilot (not req'd for Western Rivers towing vessels) | 33 CFR 164.72(b)(3) |
| | _ Tide tables (not req'd for Western Rivers towing vessels) | 33 CFR 164.72(b)(3) |
| 2. O | Navigation Equipment (see explanation in the July 3, 1998 Federal Register Final Rule) | |
| | _ Marine Radar | 33 CFR 164.72(a) 1) |
| | _ Searchlight | 33 CFR 164.72(a)(2) |
| | _ VHF-FM Radio vitability to separately monitor Ch. 13 (or 67 on the LMR) and Ch. 16 | 33 CFR 164.72(a)(3) |
| | _ Magnetic Compass or Swing Meter | 33 CFR 164.72(a)(4) |
| | _ An Echo Depth Sounding Device (not req'd for Western Rivers towing vessels) | 33 CFR 164.72(a)(5) |
| | _ Electronic position fixing device (not req'd for Western Rivers towing vessels) | 33 CFR 164.72(a)(5) |
| 3. O | Navigation Lights (masthead, side, towing, and stern lights) | 33 USC 2023(a) |
| | (Inland Rule 23 - underway without tow, Inland Rule 24(f) Underway with tow) | |
| | _ Navigation Side Lights fitted with block screens (<20M/65.6') | 33 CFR 84.09 |
| | _ Towing: Two amber towing lights at stern | 33 USC 2024(d) |
| 4. O | Efficient whistle and fog bell ( > 39.4') | |





## TOWING VESSEL BOARDING FORM

| Item | Requirement | Regulation |
|---|---|---|

**D. MARPOL Annex V - Garbage Pollution Prevention:**

| | | |
|---|---|---|
| 1. O | MARPOL Placard(s) posted (9" X 4" with > 1/8" letters(Vsls >26') | 33 CFR 151.59 |
| | Any written procedures prohibiting discharge of materials listed in Annex A of 33 CFR 151 (Not required by regulation - Good Practice) | |
| | _ Is vessel complying with disposal of plastics, grease, rags, glass, metals, etc. 46 CFR 25-50-1 and Annex A Table of 33 CFR 151 | 33 CFR 88.05 |

**E. Marine Sanitation Device:**

| | | |
|---|---|---|
| 1. O | Certified Marine Sanitation Device installed Type:_____. | 33 CFR 159.7 |
| | _ MSD overboard discharge valve installed and closed | 33 CFR 159.53(c) |
| | _ Are onboard sewage pump and arrangements adequate | 33 CFR 159.7 |

**F. Fire Fighting Equipment:**

| | | |
|---|---|---|
| 1. O | All required fire extinguishers CG or UL approved | 46 CFR 25.30-10 |
| | _ All required fire extinguishers in serviceable condition | 46 CFR 25.30-5 |
| | _ All required fire extinguishers have metallic or mylar name plate attached? | 46 CFR 25.30-10(d) |
| | _ Minimum number portable fire extinguishers (26' - < 40' = two B-I, 40' - 65' = three B-I, Note: One B-II = two B-I) | 46 CFR 25.30-5 |
| | _ Additional B-II's for each 1000 BHP of main engines up to six | 46 CFR 25.30-20(b)(2) |
| | _ One B-III or fixed fire extinguishing system in engine room ( >300 G.T.) | 46 CFR 25.30-20(b)(2) |

**G. Pollution Prevention:**

| | | |
|---|---|---|
| 1. O | Prohibited Discharge Warning Placard (5" X 8") posted (>26') | 33 CFR 155.450 |
| | _ Is machinery or other oil drained to the bilges | 33 CFR 155.770 |
| 2. O | Fixed or portable means to discharge oily bilge slops | 33 CFR 155.410 |
| 3. O | Certificate of Financial Responsibility (COFR) (>300 G.T.) | 33 CFR 130.1 & 3 |
| 4. O | Is fuel oil discharge containment adequate for oil transfer | 33 CFR 155.320 |
| 5. O | Oily waste/slop retention system & disposal (not required if essentially dry bilges) | 33 CFR 155.330 |
| | _ Bilge slop system adequate (fixed piping, flange, etc.) | 33 CFR 155.410 |
| | _ Oil transfer hose (if on board or if applicable) | 33 CFR 155.800 |
| 6. O | "Person-in-Charge" instructed in duties and FWPCA laws and regs | 33 CFR 155.710(e)(2) |
| | _ Records contain required info (person-in-charge, lease info) | 33 CFR 155.820 |
| 7. O | Oil Transfer Procedures available | 33 CFR 155.740 |
| | _ Contents of Oil Transfer Procedures meet requirements | 33 CFR 155.750 |

## TOWING VESSEL BOARDING FORM

| Item | Requirement | Regulation |
|---|---|---|

### H. Miscellaneous:

1. O Properly licensed operator(s) for towing vessels >26 FT, endorsed for route, w/ radar and. 46 CFR 15.810
2. O Operator aware of marine casualty reporting requirements 46 CFR 4.05-1
3. O Company participates in a drug testing program 46 CFR 16.205

### I. General Housekeeping, Including Machinery Spaces:

1. O Living spaces are clean, no build up of debris nor evidence of smoking in bed.
DESCRIBE ANY UNSAT CONDITIONS NOTED AND IF CORRECTIONS WERE MADE:

_____

_____

2. O Galley cleanliness and refrigeration - SAT or UNSAT.
IF UNSAT NOTE THE PROBLEM(S) AND IF CORRECTIONS WERE MADE.

_____

_____

3. O Main deck stanchions and chains

4. O Fuel tank vents are covered with flame screens

5. O Machinery spaces condition: guards in place around all moving machinery, piping is in good condition, no hazards noted. NOTE ANY PROBLEMS FOUND IN MACHINERY SPACES AND IF THEY WERE CORRECTED:

_____

_____

6. O Electrical systems: no jury rigged wiring, guards and globes cover exposed lights in work or external areas, electrical boxes are in satisfactory condition, switches are covered
NOTE ANY PROBLEMS FOUND WITH ELECTRICAL SYSTEMS AND IF THEY WERE CORRECTED:

_____

_____

7. O Steering system: Observe operation and note any problems with hydraulic lines or leakages.

_____

_____





## TOWING VESSEL BOARDING FORM

### J. Examiners Comments:

**Examiner's overall impression of the vessel's appearance and the crew's behavior. Include any suggestions made by the crew as well as any positive comments derived from this examination:**

_____

_____

_____

_____

_____

_____

_____

### K. Unscheduled Boarding Deficiencies:

**(COMPLETE THIS SECTION ONLY IF CONDUCTING AN UNSCHEDULED BOARDING) As a result of the examination of your vessel, the following deficiencies were noted and may be submitted for civil penalty action (Be specific):**

_____

_____

_____

_____

_____

_____

_____

### L. Scheduled Voluntary Examination Deficiencies:

**(COMPLETE ONLY IF CONDUCTING A SCHEDULED VOLUNTARY DOCKSIDE EXAMINATION) As a result of the examination of your vessel, the following deficiencies were noted that prevented the issuance of the Cooperative Towing Vessel Examination Decal:**

_____

_____

_____

_____

_____

_____

_____

**TOWING VESSEL BOARDING FORM**

When these items have been corrected, please call to schedule a follow-up examination to receive the the Cooperative Towing Vessel Examination Program Decal. You should keep this letter on board your boat.

Congratulations! Your vessel is in full compliance with the U. S. Coast Guard's Uninspected Towing Vessel Safety regulations for the operations described above. As evidence of this, Uninspected Towing Vessel Decal number_____ has been affixed to your vessel. You are urged to maintain the high standards required to receive this decal. If you sell the boat, you should remove the decal. Any suggestions you may have to improve the program can be provided to the Examiner or you may write them on the reverse of this form.

Examiner's Name/Rank/Rate_____Unit_____

Exam Location_____Date _____

Exam Hours: Time Exam Started_____ Time Exam Completed:_Travel Time: _____

X_____ X_____

Signature of Company Representative Signature of Boarding Officer





# EIGHTH COAST GUARD DISTRICT COOPERATIVE TOWING VESSEL EXAMINATION PROGRAM

## TOWING VESSEL SAFETY REQUIREMENTS

# Towing Vessel Safety Requirements

**Overview**

This document applies to U.S. uninspected towing vessels (UTVs) that do not carry passengers or freight for hire. It has been developed to assist UTV owners and operators and Coast Guard boarding officers during scheduled examinations or random boardings of UTVs. It is not meant to replace the federal regulations. For precise language and exemptions to various regulations, it is recommended that Title 46, Code of Federal Regulations (CFR) SubChapter C and other CFR's, which set forth minimum requirements for UTVs, be consulted. UTV operators must meet Coast Guard licensing requirements as well.

Each section corresponds to the checklist, which is attached to the back of this booklet. For example, section 1 of this document corresponds to section 1 of the checklist.

**Abbreviations**

Listed are abbreviations found in this document:

USC: Title 46, United States Code
CFR: Code of Federal Regulations
CG: U.S. Coast Guard
COTP: USCG, Captain of the Port
OCMI: USCG, Officer-in-Charge Marine Inspection
MSD: Marine Sanitation Device
MSO: Marine Safety Office
PFD: Personal Flotation Device
UTVs: Uninspected Towing vessels

**Copy of Regulations**

You may purchase a copy of these regulations by calling the Government Printing Office at (202) 512-1800 or order by facsimile and credit card at (202) 512-2233. Request Title 46, CFR Parts 1 to 40.



## Section A: Required Markings and Documentation

**Certificate of Documentation**

A UTV of at least five net tons that engages in domestic or coastwise trade must have a Certificate of Documentation (COD) onboard bearing a valid endorsement for the activity in which it is engaged. 46 CFR 67.7

**UTVs Over 5 Net Tons**

UTVs whose route is from point "A" in the U.S. to point "B" in the U.S., or returning to point "A" without leaving U.S. territorial waters must hold a COD documented for coastwise trade. 46 CFR 67.15

Endorsements for CODs' are valid for 1 year. Prior to expiration, the owner must renew by executing an original Notice of Expiration (CG-1280) or Final Notice of Expiration (CG-1280-B) certifying that information contained in the COD and endorsements remain accurate and that the COD has not been wrongfully withheld, lost, or mutilated. The forms and information for renewal can be obtained through the Coast Guard's National Vessel Documentation Center at 1-800-799-8362. The owner will receive a renewal decal which must be affixed to the COD to prove that the COD has been renewed. 46 CFR 67.163

**Vessel Markings**

Vessel markings in accordance with 46 CFR 67.123:

The name of the UTV must be marked on some CLEARLY visible exterior part of the port and starboard bow and the stern. The hailing port must be marked on some clearly visible exterior part of the stern.

For UTVs with a square bow, the name must be marked on some clearly visible exterior part of the bow in a manner to avoid obliterating. The name and hailing port must be marked on some clearly visible exterior part of the stern.

These markings, which may be made by the use of any means and materials which result in durable markings, must be made in clearly legible letters of the Latin alphabet or Arabic or Roman numerals not less than four inches high.

**Tests and Inspections**

Required pre-voyage or crew change tests and inspections in accordance with 33 CFR 164.80(b):

The owner, master, or operator of each towing vessel of 1,600 GT or more shall ensure that the following tests of equipment occur at the frequency required by 33 CFR 164.25, and that the following inspections of gear occur before the vessel embarks on a voyage of more than 24 hours, or when each new master or operator assumes command:

Navigational equipment: Tests of onboard equipment as required by 33 CFR 164.25.

Terminal gear: Visual inspection of tackle; of connections of bridle and towing pendant, if applicable; of chafing gear; and of the winch brake, if installed.

**Valid Radio Station License**

Valid radio station license in accordance with 47 CFR 80.25:

All stations in the maritime services must be licensed by the FCC.

Licenses for ship stations in the maritime services will normally be issued for a term of ten years from the date of original issuance, major modification, or renewal.

**Restricted Operator's License**

Restricted operator's license in accordance with 33 CFR 164.72(a)(3):

Each U.S. towing vessel of 26 feet (about 8 meters) or more in length, except a public vessel, must hold a ship-radio-station license for radio transmitters (including radar an EPIRBs), and each operator must hold a restricted operator's license or higher.





## Section B: Lifesaving Equipment

**Personal Floatation Devices or Life Preservers**

UTVs' less than 40 ft long must have at least one CG approved TYPE I PFD, TYPE II buoyant vest, or TYPE III buoyant device of a suitable size for each person. UTVs 40 ft long or more must have at least one CG approved TYPE I PFD of a suitable size for each person. Kapok and fibrous glass life preservers without plastic covered pad inserts are unacceptable. UTVs may substitute a CG approved exposure suit for a life preserver, buoyant vest, or buoyant device. 46 CFR 25.25-5(b), (c) & (e)

Approved commercial hybrid PFDs may be substituted for life preservers if:

It is worn when the UTV is underway and the intended wearer is not within an enclosed space;

It is used in accordance with the marked conditions on the PFD and in the owner's manual; and

Labeled for use on uninspected commercial vessels.

Lifesaving equipment required to be worn must be readily accessible and equipment designed to be thrown must be immediately available. 46 CFR 25.25

Each life preserver, buoyant device, and buoyant vest must have approved Type I retroreflective material with at least 200 sq. cm. (31 sq. in.) of material on the front, at least 200 sq. cm. on the back, and, if reversible, at least 200 sq. cm. on each reversible side. The material attached on each side must be divided equally between the upper quadrants of the side and as close as possible to the shoulder area. 46 CFR 25.25-15

On Ocean or Coastwise voyages each life preserver and buoyant device or vest must have a CG approved PFD light attached to the front shoulder area. 46 CFR 25.25-13

If a PFD light has a non-replaceable power source, it must be replaced on or before expiration date.

If the light has a replaceable power source, the power source must be replaced before its expiration date.

**Work Vests**

When carried on UTVs, approved buoyant vests shall be stowed separately from the regular stowage of required lifesaving equipment. 46 CFR 26.30-10

The lifesaving equipment must be CG approved and in serviceable condition. 46 CFR 25.25-11

**Ring Life Buoy**

Each UTV 26 feet or longer in length must have at least one CG approved throwable ring life buoy with a minimum outside diameter of 20 inches. 46 CFR 25.25-5(d)

**Emergency Position Indicating Radio Beacon (EPIRB)**

A UTV 36 ft or more in length, in accordance with 46 CFR 25.26-20, shall not be operated **on the high seas** (operates beyond three miles unless it has:

A float-free, automatically activated Category I 406 Mhz EPIRB stowed in a manner so that it will float free if the vessel sinks; or

Until Feb. 1, 1998, a 121.5/243.0 Mhz EPIRB made after Oct. 1, 1988 and installed before Apr. 27, 1993. It must be a Class A EPIRB or B EPIRB that is watertight, self-buoyant, and stable in a floating position to properly transmit a distress signal.

A UTV less than 36 ft in length, or 36 ft or more with a builder's certificate saying it is built with sufficient inherently buoyant material to keep it afloat, shall, in accordance with 46 CFR 25.26-20(b), not be operated on the high seas unless it has in a readily accessible location at or near the principal steering station:

A manual activated Category 2 406 Mhz EPIRB;

A float-free, automatically activated Category 1 406 Mhz EPIRB; or

Until Feb. 1, 1998, a 121.5/243.0 Mhz EPIRB w/same requirements as stated for a UTV 36 ft long or more.





## Section C: Navigation Safety

### Pilot House Equipment

**Equipment, Charts or Maps, and Publications of Towing Vessels of 12 Meters or More in Length**

| Equipment | Western Rivers | US Nav. Waters Other than Western Rivers | Waters Seaward of Nav Waters |
|---|---|---|---|
| Radar | YES | YES | YES |
| Searchlight | YES | YES | YES |
| VHF-FM Radio | YES | YES | YES |
| Magnetic Compass | YES, may carry a swing meter in lieu of a magnetic compass | YES | YES |
| Echo Depth Sounding Device | NO | YES | YES |
| Electronic Position-Fixing Device | NO | NO | YES |
| Charts or Maps | Large enough scale & current edition or currently corrected edition | Large enough scale & current edition or currently corrected edition | Large enough Scale & currently corrected edition |
| General Publications | 1. USCG Light List<br>2. Notices to Navigation or Local Notices to Mariners<br>3. River-current Tables | 1. USCG Light List<br>2. Local Notices to Mariners.<br>3. Tidal-current Tables<br>4. Tide Tables<br>5. U. S. Coast Pilot | 1. USCG Light List<br>2. Local Notices to Mariners.<br>3. Tidal-current Tables<br>4. Tide Tables<br>5. U. S. Coast Pilot |

Information from the above chart can be found in the 3 July 1996 Federal Register: 33 CFR Part 164 Navigation Safety Equipment for Towing Vessels; Final Rule

In addition to the above, the operator of each UTV 12 meters long or more shall carry a copy of the Inland Navigation Rules, as per 33 CFR 88.05

**Navigation Lights & Sound Signals**

A UTV underway, greater than 12 meters should display, in accordance with COLREGS, Rule 24:

Two white masthead lights ahead at an arc of 225 degrees;

Red and green sidelights, from dead ahead at an arc of 112.5 degrees;

White stern light: astern at an arc of 135 degrees;

Towing light (if towing ahead): a yellow light with the same characteristics as a stern light; and

UTVs less than 12 meters may substitute one all around white light for the white mast head and stern lights.

**NOTE**: Specific arrangements for navigation lights and day signals are required when an UTV is in a towing mode. It is recommended that the Inland and International Navigation Rules be reviewed.

Sidelights on UTVs 20 meters or more in length shall be fitted with mat black inboard screens. On UTVs less than 20 meters, sidelights, if necessary to meet the arc required of the light, shall be fitted with black mat inboard screens. A combined lantern, for vessels less than 20 meters using a single vertical filament and a narrow division between the red and green sectors, external screens need not be fitted. 33 CFR 84.09

**An efficient bell and whistle** is required in accordance with the COLREGS, Rule 33:

UTVs less than 12 meters in length must have a means of making an efficient sound signal.

UTVs of 12 meters and more in length must have a whistle and bell:

UTVs of 12 to 20 meters in length must have a bell of at least 200 mm (7.9 inches) in diameter. 33 CFR 86.23

UTVs over 20 meters in length must have a bell of at least 300 mm (11.8 inches) in diameter. 33 CFR 86.23

**Note**: The bell does not have to be mounted, however, it must be on board the vessel and accessible.



## Section D: MARPOL ANNEX V Garbage Pollution Prevention

**General Requirements**

No person may discharge garbage into U.S. navigable waters. 33 CFR 151.66

**Garbage Placards**

Each placard must be at least 9 inches wide by 4 inches high, made of durable material, and with letters at least 1/8" high. The placard must notify the reader of the following in accordance with 33 CFR 151.59 (d):

Discharge of plastic or garbage mixed with plastic into any waters is prohibited.

Discharge of garbage is prohibited in U.S. navigable waters and in all other waters within three nautical miles of the nearest land.

Discharge of dunnage, lining, and packing material that float is prohibited within 25 nautical miles of the nearest land.

Other unground garbage may be discharged beyond 12 nautical miles from the nearest land.

Other garbage ground to less than one inch may be discharged beyond three nautical miles of the nearest land.

Violators are liable for civil penalties up to $25,000, fines up to $50,000, and imprisonment for up to five years per violation.

## Section E: Marine Sanitation Devices

**General Requirements**

No UTV with an installed toilet may operate in U.S. navigable waters without a USCG certified Type I, II or III MSD which includes any equipment for installation on board which designed to receive, retain, treat or discharge sewage, and any process to treat sewage. 33 CFR 159.3 & .7(a)

> Type I, MSD, means a device that, under the test conditions described in 33 CFR 159.123 and 159.125, produces an effluence (discharge) having a fecal coliform bacteria count not greater than 1,000 per 100 milliliters and no visible solids.
>
> Type II, MSD, means a device that, under the test conditions described in 33 CFR 159.126 and 159.126a, produces an effluence having a fecal coliform bacteria count not greater than 200 per 100 milliliters and suspended solids not greater than 150 milligrams per liter.
>
> Type III, MSD, means a device that is designed to prevent the overboard discharge of treated or untreated sewage or waste derived from sewage. Holding tanks can be discharged over the side no closer than three nautical miles from land.

**NOTE:** If a Type III MSD has a "Y" valve which allows discharge over the deck to a facility or through the hull over the side, it must be secured in U.S. navigable waters so as to prohibit accidental discharges overboard inside three nautical miles from land.

Each Type I or II MSD must have an identification placard attached. 33 CFR 159.55

MSDs' must have placards which provide operating instructions, safety precautions, and warnings pertinent to the MSD. The letters on the placard must be at least one eighth of an inch. 33 CFR 159.59

**MSD Systems**

After January 30, 1980, new UTVs with installed toilet facilities must be equipped with a USCG certified Type II or III MSD.33 CFR 159.7(b)

> A new UTV includes any UTV, the construction of which is initiated on or after January 30, 1975.
>
> An exception is an operable Type I MSD installed before January 31, 1980 and is properly labeled.
>
> After January 30, 1980, existing UTVs (not new UTVs) with installed toilet facilities must be equipped with a Type II or III MSD. 33 CFR 159.7(c)
>
> An exception is an operable Type I MSD installed before January 31, 1978 and is properly labeled.

**Note 1:** Any UTV 65' or under in length may utilize a properly labeled and functioning Type I MSD.

**Note 2:** Portable toilets or "porta-potties" are not considered installed toilets and are not subject to MSD regulations.





## Section F: Fire Fighting Equipment

**General Requirements**

All fire extinguishers and fixed fire extinguishing systems shall be CG approved or UL listed for marine use and marked as such. 46 CFR 25.30-5(b)

All required hand portable fire extinguishers and semi-portable fire extinguishing systems are "B" type; i.e. suitable for extinguishing fires involving flammable liquids, grease, etc. 46 CFR 25.30-10(b)

**All motorboats (vessels 65 ft in length and smaller) shall carry at least the minimum fire extinguishers as set forth in the table below:**

| Vessel Length | | Minimum Number of B-I Hand Portable Fire Extinguishers note*** | |
|---|---|---|---|
| Equal or Over | Under | No fixed FF in Machinery Space | Fixed FF in Machinery Space |
| - | 16 feet | 1 | 0 |
| 16 feet | 26 feet | 1 | 0 |
| 26 feet | 40 feet | 2 | 1 |
| 40 feet | 65 feet & under | 3 | 2 |

*note*** One B-II hand portable extinguisher may be substituted for 2 B-I hand portable extinguishers*

*This table was reproduced from 46 CFR 25.30-30(a)(1)*

**All motor vessels (vessels over 65' in length) shall carry at least the minimum fire extinguishers as set forth in the table below:**

| Gross Tonnage | | Minimum number of B-II hand portable fire extinguishers |
|---|---|---|
| Over | Not Over | |
| | 50 | 1 |
| 50 | 100 | 2 |
| 100 | 500 | 3 |

*This table was reproduced from 46 CFR 25.30-20(b)(1)*

**Note:** In addition to the hand portable fire extinguishers required by 46 CFR 25.30-20(b)(1), a B-II portable fire extinguisher is required for each 1000 B.H.P. of the main engines or fraction thereof. However, not more than 6 such extinguishers need to be carried.

All hand portable and semiportable fire extinguishers shall have a permanently attached metallic name plate with name of item, rated capacity, name & address of person or firm for whom approved, and identifying mark of manufacturer. 46 CFR 25.30-10(d)

On motor vessels over 300 gross tons either one Type B-III semiportable fire extinguishing system shall be fitted, or alternatively, a fixed fire extinguishing system shall be fitted in the machinery space.

Fixed fire extinguishing systems will be a CG approved carbon dioxide type, designed and installed in compliance with the requirements of 46 CFR 76.15. 46 CFR 25.30-15

## Section G: Pollution Prevention

**General Requirements**

UTVs 26 ft or more in length must have a placard posted in a machinery space or a bilge control station in accordance with 33 CFR 155.450. The placard must be at least 5 by 8 inches, made of durable material, and shall state:

***DISCHARGE OF OIL PROHIBITED***

> ***The Federal Water Pollution Control Act prohibits the discharge of oil or oily waste into or upon the navigable waters of the U.S. or the waters of the contiguous zone if such discharge causes a film or sheen upon or a discoloration of the surface of the water or causes a sludge or emulsion beneath the surface of the water. Violators are subject to a substantive civil penalty and/or criminal sanctions including fines & imprisonment.***

No person may intentionally drain oil or hazardous materials from any source into the bilge. 33 CFR 155.770

No person may operate a U.S. non-oceangoing UTV in U.S. navigable waters unless it has the capacity to retain on board all oily mixtures and is equipped to discharge the oily mixtures to a reception facility. 33 CFR 155.330

**Bilge Slops Retention**

Oceangoing UTVs shall have the capacity to retain all oily mixtures on board and be equipped to discharge to a reception facility or be equipped with a CG approved oily-water separator. An oily residue tank is not required on these UTVs. 33 CFR 155.350

A non-oceangoing UTV may not be operated in U.S. navigable waters, as stated in 33 CFR 155.410, unless:

> It has at least one pump to discharge oily mixtures from a fixed piping system to a reception facility;
>
> Piping system has at least one outlet accessible from the vessel weather deck.
>
> Each outlet has a shore connection that meets the specifications of 33 CFR 155.430 or the UTV has at least one portable adapter that meets the same specifications and fits the required outlets; and
>
> The outlet has a stop valve on the weather deck.

*The previous requirements do not apply to UTVs that have a CG approved oily-water separator.*

An oceangoing UTV over 100 g.t. may not operate on U.S. navigable waters, as stated in 33 CFR 155.420, unless:

> It has at least one pump to discharge oily mixtures from a fixed piping system to a reception facility;
>
> The piping system has at least one outlet that is accessible from the vessel weather deck;





> Each outlet has a shore connection that meets the specifications of 33 CFR 155.430 or the UTV has at least one portable adapter that meets the same specifications and fits the required outlets;
>
> The UTV has a means on the weather deck near the discharge outlet to stop each oily waste pump; and
>
> The outlet has a stop valve on the weather deck.

*The above requirement does not apply to a UTV that has a CG approved oily-water separator.*

**Fuel Oil Discharge Containment**

In accordance with 33 CFR 155.320, fuel oil and lubricating oil discharge containment for UTVs of 100 g.t. or more must:

Have a fixed container or enclosed deck area under or around each fuel oil or lubricating oil tank vent, overflow, and fill pipe that has a capacity of at least one-half barrel capacity; or

> Equip each oil tank vent, overflow, and fill pipe during oil transfer operations with a portable container of at least a 5 U.S. gal. capacity; or
>
> If the UTV has fittings for which containment is impractical, use an automatic back pressure shut off nozzle.

**Oil Transfer Hoses**

Each oil or hazardous material transfer hose, for UTVs over 100 g.t., must meet the following requirements of 33 CFR 154.500:

> The minimum design burst pressure must be at least 600 PSI and at least four times the sum of the pressure of the relief valve setting, plus the static head pressure of the transfer system at the point where the hose is installed.
>
> The MAWP must be at least 150 PSI and more than the sum of the pressure of the relief valve setting (or maximum pump pressure when no valve is installed) plus the static head pressure of the transfer system at the point where the hose is installed.
>
> Each nonmetallic hose must be usable for oil and hazardous material service.
>
> Each hose assembly must either have full threaded connections; flanges that meet standard B.16.5, Steel Pipe Flanges and Flange Fittings; or standard B.16.4, Brass or Bronze Pipe Flanges, of the American National Standards Institute (ANSI); or quick-connect couplings acceptable to the CG.

Each hose must be marked with:

> Name of products for which the hose may be used or, for oil products, the words "oil service";
>
> Maximum allowable working pressure (MAWP);
>
> Date of manufacturer; and

Date of latest test required by 33 CFR 156.170; Nonmetallic transfer hoses must not have soft spots, unrepaired bulges, or defects which would permit the discharge of product through the hose material; no gouges or cuts penetrating the first layer of the hose; no internal deterioration; and not burst, bulge, or leak under static liquid pressure of at least 1.5 times the MAWP.

Each hose used to transfer fuel to a UTV that has a fill pipe for which containment cannot practically be provided must be equipped with an automatic back pressure shut off nozzle.

**Oil Transfer Procedures**

For UTVs of **100 g.t. or more** the person in charge of an oil transfer must have been instructed by the operator in his/her duties and federal laws and regulations that apply to the vessel in accordance with 33 CFR 155.710(a)(4)

For UTVs with a capacity of **250 bbls (approx. 10,500 gals) or more of oil or hazardous material**, transfer procedures are required for vessels transferring to or from the vessel or from tank to tank. These procedures must be readily available and on board. See 33 CFR 156 and 33 CFR 155.720

A UTV, with a capacity of **250 or more barrels of oil or hazardous materials**, conducting transfer operations between sunset and sunrise must have deck lighting that adequately illuminates all transfer work areas in accordance with 33 CFR 155.790

The UTV operator shall keep a written record available for inspection by the CG, in accordance with 33 CFR 155.820 indicating:

The name of each person currently designated as a person in charge of transfer operations;

The date and result of most recent test and inspection of items as required by 33 CFR 156.170;

The hose information required by 33 CFR 154.500, unless that information is marked on the hose; and

The "Declaration of Inspection" as required by 156.150(f).

**Certificate of Financial Responsibility (COFR)**

All UTVs' **over 300 g.t.** are required to have Certificates of Financial Responsibility in accordance with 33 CFR 130.1





## Section H: Miscellaneous

**Personnel Licensing**

Every UTV at least 26 feet in length must be under the direction and control of an individual licensed by the Coast Guard as per 46 CFR 15.810

The following rules apply for operators of UTVs in accordance with 46 CFR 15.910:

An individual of 21 years or more of age holding a license as master of inspected, self-propelled vessels, or a license as mate or pilot of inspected, self-propelled vessels of not more than 200 gross tons, is authorized to serve as operator of an UTV.

A licensed mate authorized to serve as operator of an UTV may only be in command on domestic routes.

An individual of 19 years or more of age holding a license which authorizes service as mate of vessels of not more than 200 gross tons is authorized to serve as second-class operator of UTVs'.

Note: Towing vessels under 200 g.t. in the mineral and oil exploitation industry are not subject to the provisions relating to licensed operators.

Each licensed individual serving on a radar-equipped UTV of 26 feet or more in length shall hold a valid endorsement as radar observer or valid certificate from a radar-operation course (if his or her license is dated **before** February 15, 1995). 46 CFR 15.815

An individual may not serve in a position in which the individual is required to hold a license unless the individual holds a valid license authorizing service in the capacity in which the individual is employed and the individual serves within any restrictions placed on the license as per 46 CFR 15.401.

You must have the original of your license in your possession and immediately available when operating a UTV. 46 CFR 26.20-1(a)

**Merchant Mariners Documents**

On UTVs over 100 g.t., not on a Rivers route, all licensed personnel and crewmembers shall hold valid Merchant Mariners Documents.

**Verbal Notice of Marine Casualty**

The following applies to UTVs' in accordance with 46 CFR 4.05-1:

Immediately after addressing safety concerns, the owner, master, operator, or person in charge shall notify the nearest CG MSO or Group whenever a vessel is involved in a marine casualty, i.e.:

An unintended grounding, or an unintended strike of a bridge or bridge fendering system;

An intended grounding or an intended strike of a bridge that creates a hazard to navigation, the environment, or safety of a vessel;

Loss of main propulsion, primary steering, etc. that reduces the maneuverability of the vessel;

An occurrence adversely affecting the seaworthiness or fitness including fire; flooding, or failure of/damage to fire fighting, lifesaving, & auxiliary power equipment; or bilge-pumping systems;

A loss of life;

Injury requiring professional medical treatment and, for a crewmember, that renders the individual unfit to perform his or her routine duties; or

Occurrence causing property damage above $25,000 including cost of labor and material but not cost of salvage, gas-freeing, dry-docking, or demurrage.

**Written Notice of Marine Casualty**

In addition to the verbal report, the owner, master, operator, or person in charge shall, within five days, file a written report with the nearest MSO on form CG-2692: Report of Marine Accident, Injury or Death and, as necessary, be supplemented by form CG-2692B: Report of Required Chemical Drug & Alcohol Testing following a Serious Marine Incident. 46 CFR 4.05-10

**Drug Testing Program**

**Pre-employment Testing**

No marine employer shall engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer. This may be waived if the individual can satisfactorily provide evidence that the individual either passed a chemical test for dangerous drugs within the past six months with no subsequent positive tests or during the previous 185 days been subject to random testing for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs. 46 CFR 16.210

**Periodic Testing**

Whenever a physical examination is required for an individual by this SubChapter, a chemical test for dangerous drugs must be included as a part of the physical examination. 46 CFR 16.220

**Random Testing**

Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of their crewmembers. Crewmembers shall be tested on a random basis at an annual rate of not less than 50%. Random selection means that all crewmembers have an equal chance of selection. 46 CFR 16.230(b)

**Reasonable Cause Testing**

Employers shall require any crewmember on a UTV who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs. The employer's decision must be based on a reasonable and articulate belief that the individual has used a dangerous drug based on direct observation. Where practicable, this belief should be based on observations by two persons in supervisory positions. 46 CFR 16.250





**Serious Marine Incident Testing**

The marine employer shall ensure that all persons directly involved in the incident are chemically tested for dangerous drugs and alcohol in accordance with the requirements for mandatory chemical testing. 46 CFR 16.240

A serious marine incident includes the following events involving a UTV:

A marine casualty or accident which is required to be reported to the CG and results in any of the following:

One or more deaths;

Injury requiring professional medical treatment and, for a crewmember, that renders the person unfit to perform his or her routine duties;

Damage to property in excess of $100,000;

Actual or constructive total loss of any vessel subject to inspection; or

Actual of constructive total loss of any self-propelled vessel, not subject to inspection, of 100 gross tons or more.

A discharge of oil of 10,000 gallons or more into U.S. navigable waters.

A discharge of a reportable quantity of a hazardous substance into U.S. navigable waters or a release of a reportable quantity of a hazardous substance into the environment of the United States.

**Failure of a Drug Test**

If an individual holding a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual's employer or prospective employer shall report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual shall be denied employment as a crewmember or removed from duties which directly affect the safe operation of the vessel as soon as practicable and shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document as per 46 CFR 16.201

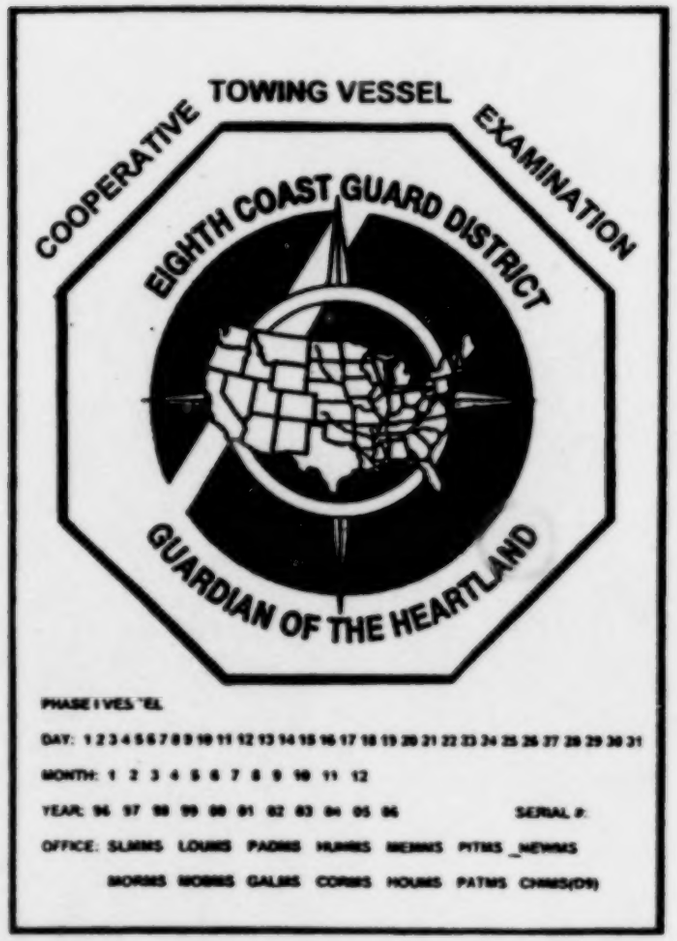
If an individual who does not hold a license, merchant mariner's document, or certificate of registry fails a chemical test for dangerous drugs, the individual shall be denied employment as a crewmember or removed from duties which directly affect the safe operation of the vessel as soon as possible. 46 CFR 16.201

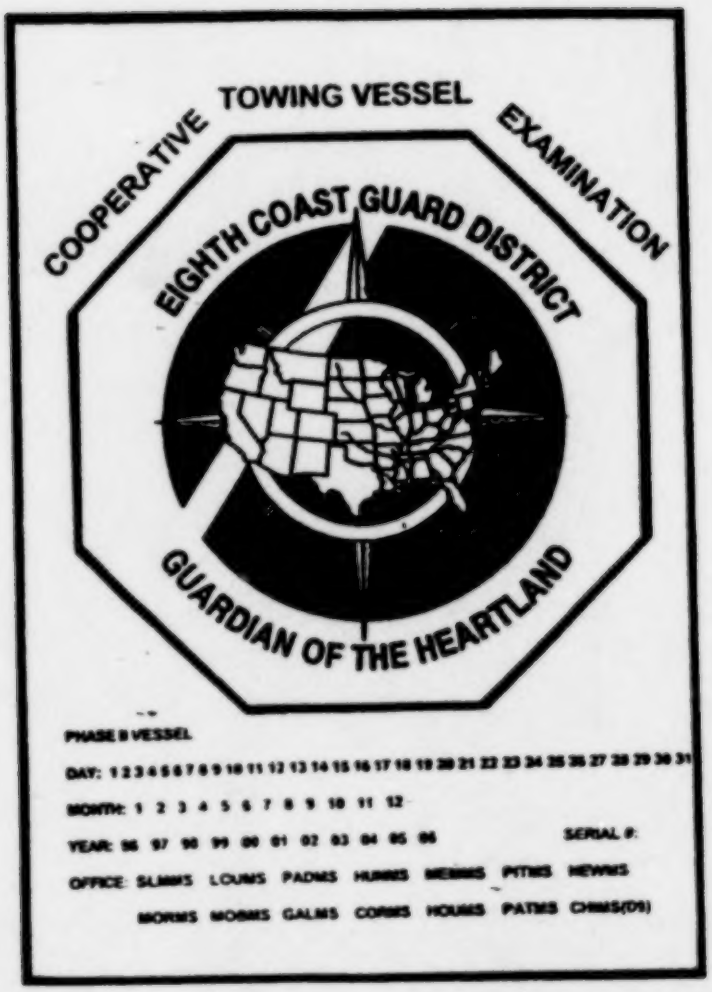
Employers shall maintain records of chemical tests which the Medical Review Officer reports as *positive* for a period of five years. Records of tests reported as *negative* shall be retained for one year in accordance with 46 CFR 16.260

# EIGHTH COAST GUARD DISTRICT
# COOPERATIVE TOWING VESSEL
# EXAMINATION PROGRAM

## DECAL DESIGN



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JUN 8 2001

Supreme Court, U.S.
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No. 00-927

IN THE

# Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,

*Petitioner,*

*v.*

MALLARD BAY DRILLING, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICI CURIAE* THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, DREDGING CONTRACTORS OF AMERICA AND NATIONAL MARITIME SAFETY ASSOCIATION IN SUPPORT OF THE RESPONDENT

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## QUESTION PRESENTED

Whether the OSHA's enabling statute overrides the Coast Guard's enabling statute.[1]

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1. In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief and that no person or entity, other than the named amicus parties, has made a monetary contribution to the preparation or submission of this brief.

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| Congress has specifically given the Coast Guard the responsibility for the "safety of life and property" on "waters subject to the jurisdiction of the United States." Congress has given the OSHA some shore side responsibility but has not given the OSHA any open water responsibility. Therefore, under the express terms of 14 U.S.C. § 2, the open water responsibility rests exclusively with the Coast Guard, and the Coast Guard may not reassign any part of tha responsibility to the OSHA. | 5 |
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## INTRODUCTORY STATEMENT

This case illustrates the danger that arises when the Executive Branch speaks with a single voice about a conflict between the enabling statutes of two different agencies. The danger is that the meaning of one statute will be sacrificed in a policy decision to favor the other statute. Here the Executive Branch, in its administrative actions and in its brief to this Court, has improperly expanded OSHA's reach into responsibilities that the Legislative Branch has reserved for the Coast Guard. The Coast Guard may have acquiesced in OSHA's assumption of responsibilities on the "waters subject to the jurisdiction of the United States," 14 U.S.C. § 2, but the Congress has not.

## INTEREST OF THE AMICI AND CONSENT OF THE PARTIES

The Associated General Contractors of America (AGC) is a national trade association representing 34,000 construction contractors, many of whom construct maritime projects on or over navigable waterways or otherwise provide services in the marine environment.

The Dredging Contractors of America (DCA) is a national trade association representing 21 contractors that perform dredging services, primarily to federal, state and local government agencies

Members of both AGC and DCA use vessels of the kind at issue here on a daily basis, and are thus subject to the overlapping jurisdictional claims of the Coast Guard and the OSHA.

The National Maritime Safety Association (NMSA) is a national trade association of marine terminal operators and stevedoring companies, all of whom occasionally utilize vessels

of the kind at issue here, and some of whom utilize vessels on a daily basis at "mid stream" transfer facilities. NMSA members also encounter the overlapping jurisdictional claims of the Coast Guard and the OSHA.

Marine safety is an important issue for the members of the Amici. Dual jurisdiction confuses industry safety programs. Amici thus have a safety interest in resolving the jurisdictional conflict presented in this case.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

## STATUTES INVOLVED

14 U.S.C. § 2

> The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and **promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department**; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high



> seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities. [Emphasis added.]

HISTORY: **Aug. 4, 1949**, ch 393, § 1, 63 Stat. 496; Oct. 5, 1961, P.L. 87-396, § 1, 75 Stat. 827; June 12, 1970, P.L. 91-278, § 1(1), 84 Stat. 304; Dec. 13, 1974, P.L. 93-519, 88 Stat. 1659; Nov. 10, 1986, P.L. 99-640, § 6, 100 Stat. 3547; Sept. 28, 1988, P.L. 100-448, § 17, 102 Stat. 1845; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle L, § 7403, 102 Stat. 4484. [Emphasis added.]

29 U.S.C. § 653(b)(1)

> **Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies**, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended, **exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.** [Emphasis added.]

HISTORY: **Dec. 29, 1970**, P.L. 91-596, § 4, 84 Stat. 1592. [Emphasis added.]

## FACTUAL STATEMENT

This case involves OSHA safety violation citations against a drilling barge that exploded from leaking gas while anchored and drilling in a navigable waterway. The OSHA issued the citations pursuant to an agreement with the Coast Guard giving the OSHA jurisdiction over vessels that the Coast Guard is not required by statute to inspect. *Mallard ~~Bay Drilling~~, Inc. v. Herman*, 212 F.3d 898, 898-99 (5th Cir. 2000), Petition App. ("PA") at 2a; *Secretary of Labor v. Mallard Bay Drilling, Inc.*, Occupational Safety and Health Review Commission, Docket No. 97-1973, ALJ Decision at PA10a-11a. The Coast Guard had issued a Certificate of Documentation to the barge, even though it considers the barge to be an uninspected vessel. ALJD at PA11a.

The Coast Guard is required to investigate marine casualties such as the explosion of this barge, and did so. *Marine Casualty Narrative Supplement* at PA24a. The Coast Guard found the explosion to be a "Major Marine Casualty." PA24a. Accordingly, the Coast Guard investigated "the issues of hazard recognition, written procedures, engineering, and overall crew competency." PA25a. OSHA conducted no separate investigation, but issued its safety violation citations on the basis of the Coast Guard's investigative findings. ALJD at PA12a.

## SUMMARY OF ARGUMENT

The OSHA is not an expert in the safety of vessels operating in open water. It relies on the Coast Guard to find violations for it, as happened in this case. Indeed, the OSHA has no inspection boats. For reasons of bureaucracy, not



expertise, the Coast Guard has been persuaded to give part of its safety jurisdiction to the OSHA.

This bureaucratic realignment is against the will of the Congress, and makes no more sense than if the OSHA were to give the Coast Guard safety responsibility for manufacturing plants on dry land. Both agencies should fulfill their own statutory responsibilities.

This Court may wish to note that, despite *OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the Secretary of Labor is still using presumptions to shift the burden of proof, this time for the purpose of expanding the jurisdiction of the OSHA. *See* footnotes 2 and 3, *infra*, and the related text.

## ARGUMENT

**Congress has specifically given the Coast Guard the responsibility for the "safety of life and property" on "waters subject to the jurisdiction of the United States." Congress has given the OSHA some shore side responsibility but has not given the OSHA any open water responsibility. Therefore, under the express terms of 14 U.S.C. § 2, the open water responsibility rests exclusively with the Coast Guard, and the Coast Guard may not reassign any part of that responsibility to the OSHA.**

The ALJ held — as he was required to do under the Labor Department regulations controlling his work — that there is a presumption that OSHA jurisdiction preempts that of the Coast Guard, and that the rebuttal of the preemption is an affirmative defense in which the employer bears the burden

of proving that the Coast Guard has actually regulated the "workplace." PA14a-15a.[2] This presumption, and the shifting of the burden of proof with respect to it, demonstrate the administrative bias in favor of OSHA.[3] Under Labor Department

2. The ALJD said, at PA14a-15a (emphasis added):

> Where the **employer claiming the exemption satisfies its burden of proving** that another agency has exercised its authority, OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-1704 (No. 89-1192, 1992). The term 'exercise,' as used in § 4(b)(1), requires an **actual assertion of regulatory authority as opposed to a mere possession of authority**. OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Id* at 1703-1704.
>
> In the *Alaska Trawl* case, the Commission found that, in the absence of relevant Coast Guard regulations, OSHA jurisdiction over work performed on uninspected vessels was not preempted. There was no industry-wide exemption from OSHA regulations. The Commission dismissed as dictum the implication that *Dillingham Tug & Barge Corp., 10 BNA OSHC 1859* (No. 77-4143, 1982), created an industry-wide exemption. *Id* at 1704-1705. Absent an industry wide exemption, **OSHA jurisdiction is preempted only if the Coast Guard has specifically regulated the cited condition**.

3. *Cf. OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (the Secretary of Labor may not use a presumption as a device to shift the burden of proof). In the present case, in fact, the wording of the Coast Guard statute creates a presumption that the OSHA has no jurisdiction.



regulations, OSHRC administrative judges may not even consider what the Coast Guard statute says; they may only consider what the Coast Guard does. *See* footnote 2, *supra*. Petitioner justifies this bias by referring to the jurisdictional agreement between the OSHA and the Coast Guard. Pet.Br. at 2-4. Petitioner dismisses the Coast Guard's enabling statute, not after analyzing its meaning, but by asserting that the Coast Guard's statutory authority does not apply to vessels that the latter is not statutorily required to inspect. *Id*. So totally does Petitioner dismiss the significance of the Coast Guard's enabling statute that Petitioner does not even recognize it as a "Statutory Provision Involved." Pet.Br. at 2. The only statute that the Petitioner recognizes as being "involved" in this case is the OSHA statute.

Petitioner's approach cannot be squared with the plain meaning of 14 U.S.C. § 2, which says that jurisdiction over safety in the waters of the United States rests with the Coast Guard unless the Congress has "specifically" assigned a part of that responsibility to another agency. Because the Congress has not "specifically" assigned to the OSHA any jurisdiction over vessels in navigable channels, the only possible reading of 14 U.S.C. § 2 is that the Congress has required that jurisdiction to remain with the Coast Guard.[4] The appellate courts that have found OSHA jurisdiction on navigable waterways have done so by ignoring the Coast Guard statute.[5] The analysis of those

4. "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

5. Because the Coast Guard has failed to defend its statutory jurisdiction, the appellate courts typically have accepted the Secretary

(Cont'd)

courts has been perfunctory, presumably because they have failed to see the harm in having the OSHA share the Coast Guard's jurisdiction as long as the Coast Guard is consenting. The harm is that the Coast Guard knows what it is doing, and the OSHA does not. The harm is also that the OSHA has typically made its presence felt by hyper-regulation.

Deference to an agency interpretation is not a substitute for statutory review. As this Court said in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-76 (1992):

> The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency. [Citations omitted.] Of course, **a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms.** [Emphasis added.]

In 1982, the OSHRC did read the Coast Guard enabling statute and did follow the congressional purpose.

(Cont'd)
of Labor's assertion that the only relevant statute is the OSH Act, which gives broad general jurisdiction to the OSHA. In effect, the Coast Guard has repeatedly waived its own enabling statute, and the courts have accepted the waiver without question. The Fifth Circuit in the present case, having considered the applicability of the Coast Guard enabling statute, has held that the Coast Guard has been prohibited by the Congress from waiving its exclusive open water jurisdiction in favor of the OSHA.



In *Dillingham Tug & Barge Corp.*, 10 OSH Cas. (BNA) 1659, 1982 OSHRC LEXIS 150 (reprinted as an appendix hereto for the Court's convenience), the OSHRC "examined the manner in which the Coast Guard has exercised its statutory authority to regulate the health and safety of seamen aboard vessels operating on navigable waters" and "conclude[d] that section 4(b)(1) [of the OSH Act] precludes the Secretary from enforcing the OSH Act with respect to such working conditions." 5a-6a hereto. The OSHRC looked at the scope of the Coast Guard's statutory authority, and rejected the argument that the Coast Guard was failing to regulate vessels that it was not required by statute to inspect. The OSHRC held:

> [T]he Coast Guard's reliance on its authority over inspected vessels to undertake certain regulatory activities does not imply that it believes it has no authority over uninspected vessels. The Coast Guard has statutory authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. . . ." *14 U.S.C. § 2.* The Coast Guard's general statutory authority thus extends to all vessels in navigation. Cf. *Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4780-81* [457 U.S. 668, 669] (June 23, 1982) (Coast Guard regulations designed to prevent collisions on navigable waters apply to all vessels without regard to their commercial or noncommercial nature).[6]

6. This Court's *Richardson* decision, cited in the passage just quoted, rejected the position of the dissenting appellate judge in that
(Cont'd)

8a hereto. The OSHRC decision then rejected the argument that the Coast Guard regulation of uninspected vessels was insufficient. The OSHRC said:

> As discussed above, the Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. The Coast Guard regulations are directed at protecting the health and safety of seamen. *Taylor v. Moore-McCormick Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980).* Thus, employers of seamen, such as Dillingham, must look to the Coast Guard regulations for the requirements they must comply with to protect their employees. Under the approach of the majority in Puget Sound [advocated by OSHA] such employers would also be required to compare the Coast Guard regulations with OSHA regulations, determine which conditions of the work environment are not addressed by Coast Guard regulations, and comply with OSHA requirements directed at those working conditions. This approach necessarily assumes that the Coast Guard regulations are insufficient to provide adequate protection to seamen aboard vessels on navigable waters. It is thus inconsistent with the established rule that section 4(b)(1) [of the OSH Act] does not permit an inquiry

(Cont'd)
case, who argued that not all navigable waterways are important enough to be included within the admiralty jurisdiction of the United States. 457 U.S. 668, 672 n.3. The Petitioner here similarly argues that not all vessels are important enough to be under the jurisdiction of the Coast Guard.



> into the stringency of another agency's exercise of authority. "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." Mushroom Transportation Co., *73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1392, 1973-74 CCH OSHD P16,881 at p. 21,591* (No. 1588, 1973). See also Northwest Airlines, Inc., *80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1990, 1980 CCH OSHD P24,751 at p. 30,489* (No. 13649, 1980); Pennsuco Cement and Aggregates, Inc., *80 OSAHRC 47/A2, 8 BNA OSHC 1378, 1980 CCH OSHD P24,478* (No. 15462, 1980).

10a-11a hereto. The OSHRC concluded by recognizing that "the Coast Guard is better able than OSHA to focus on the overall problem of safety on navigable waters due to its broad statutory authority over the subject." 13a hereto at n.10.

In *Dillingham*, the OSHRC refused to allow the OSHA's agreement with the Coast Guard to create a confusing "nook and cranny" division of jurisdiction, in which OSHA looked at each discrete safety item to determine whether the Coast Guard was regulating that particular item and then stepped in to bridge any gap. 5a hereto. Ten years later, in *Alaska Trawl Fisheries*, 15 OSH Cas. (BNA) 1699, 1992 OSAHRC LEXIS 70 (1992), the OSHRC dismissed its entire *Dillingham* decision as "dictum" and resumed marching to the same drummer as the Secretary of Labor. *See* footnote 2, *supra*.

In the present case the Fifth Circuit has refused to countenance the return to the "nook and cranny" approach. The Ninth Circuit, however, has recently decided in favor of that approach, and has even approved of requiring an oceangoing tug working in Alaska territorial waters to keep records for the OSHA in a style different from that required for the same information by the Coast Guard. *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239 (9th Cir. 1998). With great respect for the Ninth Circuit, we suggest that its decision makes no sense from any perspective other than letting each agency have a "piece of the action." That perspective satisfies neither the Congressional intent nor sound administrative practice, and should be rejected by this Court.

## CONCLUSION

For the reasons stated, the decision of the Fifth Circuit in this case should be affirmed.

Respectfully submitted,

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# APPENDIX

**APPENDIX — DECISION AND DISSENTING OPINION OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION DATED JULY 29, 1982**

DILLINGHAM TUG AND BARGE CORPORATION

OSHRC Docket No. 77-4143

Occupational Safety and Health Review Commission

*1982 OSAHRC LEXIS 150; 1982 OSHD (CCH) P26,166*

July 29, 1982

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

COUNSEL:

Office of the Solicitor, USDOL

Daniel W. Teehan, Regional Solicitor, USDOL

John R. Lacy, for the employer

OPINION:

DECISION

BY THE COMMISSION:

Following an accident that resulted in the death of one of Dillingham Tug & Barge Corporation's seamen, the Secretary of Labor cited Dillingham for allegedly violating

section 5(a)(1)[1] of the Occupational Safety and Health Act of 1970[2] ("the Act" or "the OSH Act"). Dillingham contends that the Secretary lacks jurisdiction over the working conditions of seamen, and that pursuant to section 4(b)(1) of the Act,[3] the Secretary was precluded from issuing the citation by virtue of Coast Guard regulation of the cited working condition. Administrative Law Judge Jerry W. Mitchell rejected Dillingham's arguments and affirmed the citation.[4] Dillingham filed a petition asking the Commission to review the judge's decision. Pursuant to section 12(j) of the Act, *29 U.S.C. § 661*(1), former Commissioner Barnako directed review on the following issue:

---

1. Section 5(a)(1), *29 U.S.C. § 654*(a)(1), provides:

> Sec. 5.(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

2. *29 U.S.C. § § 651*-678.

3. Section 4(b)(1), *29 U.S.C. § 653*(b)(1), provides in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

4. Dillingham and the Secretary entered into a partial settlement agreement by which, if Dillingham's arguments relating to the Secretary's authority to issue the citation were rejected, the citation would be affirmed.





Whether the administrative law judge erred in concluding that the U.S. Coast Guard did not exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health respecting the working conditions involved herein, and therefore that Respondent Dillingham Tug & Barge Corporation was not exempt from the requirements of the Act.

For the reasons that follow, we reverse the judge's deci..on and vacate the citation.

I

Dillingham provides towboat services to vessels in the navigable waters surrounding Hawaii. On July 3, 1977, two towboats owned and operated by Dillingham, the MAPU and the MA'A, were assigned to help moor an oil tanker, the AEGEAN ISLAND, at an anchorage approximately two miles offshore from Barbers Point, Oahu, Hawaii.

To accomplish the mooring operation, the towboats had to run lines from the AEGEAN ISLAND to certain mooring buoys located in the anchorage. Some of the mooring lines were secured without difficulty. Two of the lines, however, proved to be too short to reach the appropriate buoys. To secure these lines, the MAPU pushed the buoys toward the MA'A, which held the lines that ran from the AEGEAN ISLAND. A seaman on board the MAPU, Francis Kane, then boarded the buoys to assist the crew of the MA'A secure the lines. After the lines were secured, the MAPU proceeded to the final buoy so that Kane could again come on board. When the MAPU was near the buoy, Kane lost his balance, fell

from the buoy, and was crushed between the MAPU and the buoy. The Coast Guard investigated the incident and found no evidence that it involved any violation of law or regulation. The Secretary also conducted an investigation and cited Dillingham for allegedly violating section 5(a)(1) of the OSH Act.

II

In Puget Sound Tug & Barge, *81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD P25,373* (No. 76-4905, 1981),[5] a divided Commission rejected the argument that section 4(b)(1) precludes the Secretary of Labor from citing an employer for alleged violations of the OSH Act that involve the working conditions of seamen aboard vessels on navigable waters. The majority viewed this argument as seeking an "industry-wide exemption" from the Act and rejected the argument on the basis of precedent holding that "section 4(b)(1) was not designed to create industry-wide exemptions, but rather exemptions only over those working conditions that have been the subject of an exercise of another agency's statutory authority to regulate occupational safety and health." *9 BNA OSHC at 1775, 1981 CCH OSHD at p. 31,595.* The majority cited, among other cases, *Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976),* cert. denied, *434 U.S. 874 (1977),* and *Southern Railway Co. v. OSHRC, 539 F.2d 335* (4th Cir.), cert. denied, *429 U.S. 999 (1976).* Thus, although acknowledging that the Coast Guard possessed broad statutory authority to issue regulations promoting safety on navigable waters and that

5. Appeals filed, Nos. 81-7405 and 81-7406 (9th Cir. June 26, 1981); No. 81-4243 (5th Cir. June 24, 1981).



the Coast Guard had issued regulations pursuant to this authority, the majority concluded that the Coast Guard's exercise of authority did not entirely exempt from the Act the working conditions of seamen aboard vessels on navigable waters. Instead, the majority concluded that section 4(b)(1) only precluded the Secretary from citing those specific working conditions that were the subject of applicable Coast Guard regulations. In dissent, Commissioner Cleary rejected what he referred to as the majority's "nook and cranny" theory. He believed that the Coast Guard's regulations affecting the working conditions of seamen were so comprehensive that it would impair, if not destroy, the fabric of the Coast Guard's regulatory scheme to apply OSHA standards to situations for which the Coast Guard lacked applicable regulations. *9 BNA OSHC at 1782, 1981 CCH OSHD at p. 31,601.*

We have reconsidered the Commission's holding in Puget Sound.[6] We conclude that section 4(b)(1) in certain circumstances can create industry-wide exemptions from the OSH Act. Having examined the manner in which the Coast Guard has exercised its statutory authority to regulate the health and safety of seamen aboard vessels operating on navigable waters, we conclude that section 4(b)(1) precludes

6. Puget Sound involved vessels inspected and certificated by the Coast Guard, while the vessel in this case, the tugboat MAPU, was not so inspected and certificated. As pointed out later in this opinion, however, the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case.

the Secretary from enforcing the OSH Act with respect to such working conditions. We overrule Puget Sound to the extent it is inconsistent with this holding.

III

Coast Guard regulations applicable to maritime operations are found in 46 C.F.R., Chapter I. These regulations were promulgated pursuant to the Coast Guard's statutory authority to promote safety on the navigable waters of the United States. See *Puget Sound, 9 BNA OSHC at 1773-74, 1981 CCH OSHD at pp. 31,593-94.* Chapter I contains a number of subchapters, some of which apply to specific types of vessels and some of which apply to other subjects. The following list of the subchapter titles generally illustrates the Coast Guard's regulatory scheme.

| Subchapter | Title |
|---|---|
| A | Procedures Applicable to the Public |
| B | Merchant Marine Officers & Seamen |
| C | Uninspected Vessels |
| D | Tank Vessels |
| E | Load Lines |
| F | Marine Engineering |
| G | Documentation and Measurement of Vessels |
| H | Passenger Vessels |
| I | Cargo and Miscellaneous Vessels |
| I-A | Mobile Offshore Drilling Unite |
| J | Electrical Engineering |
| L-M | Reserved |
| N | Dangerous Cargoes |
| O | Certain Bulk Dangerous Cargoes |





| Subchapter | Title |
|---|---|
| P | Manning of Vessels |
| Q | Equipment, Construction, and Materials: Specifications and Approval |
| R | Nautical Schools |
| S | Reserved |
| T | Small Passenger Vessels (under 110 gross tons) |
| U | Oceanographic Vessels |
| V | Marine Occupational Safety and Health Standards[7] |

As noted above, Dillingham's tugboat, the MAPU, was not inspected and certificated by the Coast Guard. The regulations in Subchapter C, entitled "Uninspected Vessels," apply to all vessels except those covered by the other subchapters of 46 C.F.R., Chapter I. 46 C.F.R. § 24.05-1(a) and accompanying Table 24.05-1(a). The only exceptions are vessels operating exclusively on inland waters which are not navigable waters of the United States, vessels while laid up and dismantled and out of commission, and certain vessels with title vested in the United States and used for public purposes. 46 C.F.R. § 24.05-1(a). Thus, any vessel not owned by the United States and operating on navigable waters is covered by Coast Guard regulations under either Subchapter C or some other subchapter of 46 C.F.R., Chapter I.[8]

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7. This subchapter applies to commercial diving operations.

8. Relying on Coast Guard statements, in a Memorandum of Understanding with OSHA and in an advance notice of proposed rulemaking for diving standards, that the Coast Guard has statutory authority to regulate the working conditions of employees on vessels

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(Cont'd)
subject to Coast Guard inspection and certification, the dissenting opinion suggests that the Coast Guard itself recognizes OSHA jurisdiction over uninspected vessels. We do not draw the same conclusion from these statements.

The Coast Guard unquestionably has specific statutory authority to inspect and certify certain types of vessels and to issue regulations governing such vessels. See *46 U.S.C. § § 361*-436. Various subchapters of 46 C.F.R., Chapter I deal exclusively with inspected and certificated vessels. However, the Coast Guard's reliance on its authority over inspected vessels to undertake certain regulatory activities does not imply that it believes it has no authority over uninspected vessels. The Coast Guard has statutory authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. . . ." *14 U.S.C. § 2.* The Coast Guard's general statutory authority thus extends to all vessels in navigation. Cf. *Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4780-81* (June 23, 1982) (Coast Guard regulations designed to prevent collisions on navigable waters apply to all vessels without regard to their commercial or noncommercial nature). Moreover, the reference in the Memorandum of Understanding to the Secretary's maritime jurisdiction may simply be in recognition of the undisputed fact that the Secretary has jurisdiction over certain types of maritime work, such as longshoring and shipbuilding. See *Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3d Cir. 1976)* (application of OSHA standard to longshoring operation); Bethlehem Steel Corp., *82 OSAHRC, 10 BNA OSHC 1673, 1982 CCH OSHD P26,083* (No. 77-1807, 1982) (application of OSHA shipbuilding standards).

The dissent also suggests that our decision renders a nullity an agreement between the Coast Guard and OSHA concerning the

(Cont'd)



An examination of the regulations in Subchapter C indicates that the Coast Guard has made provision for protection against a vareity of hazards that may arise in the operation of uninspected vessels. Among the subjects regulated are navigation; ventilation; fire protection equipment; life preservers and other lifesaving equipment; the design, construction, and testing of boilers and machinery; liquified petroleum gas; backfire flame arrestors for gasoline engines; safety orientation and emergency instructions; and pilot ladders. In addition, various provisions of other subchapters, such as Subchapter P - entitled "Manning of Vessels" - apply to uninspected vessels as well as to other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels, as illustrated by the Coast Guard investigation that followed the accident

(Cont'd)
enforcement of OSHA diving standards. This case does not involve diving standards and we have no occasion to consider whether or under what circumstances OSHA can enforce such standards. The dissent takes note of cooperation between the Coast Guard and OSHA, and suggests that this mechanism for resolving 4(b)(1) conflicts will be threatened by our decision. We note that if any significant degree of cooperation existed between agencies on the matters at hand, we would expect the Commission to be so advised. Since neither agency has advised the Commission of any such understanding, we must assume that recently developed memoranda of understanding are irrelevant to this litigation. In any event, it is our statutory responsibility to decide whether private employers have violated the Act as alleged by the Secretary, and agreements or cooperation between OSHA and other agencies cannot detract from an employer's right to have its section 4(b)(1) claim adjudicated by the Commission.

involved in this case. See 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters.

IV

Prior to the OSH Act's passage, Congress had given authority to regulate particular working conditions to federal agencies other than the Secretary of Labor.[9] Congress believed that it would be beneficial to employee safety and health if agencies that had specialized expertise in regulating particular working conditions continued to do so. Thus, Congress intended that other agencies that had been given statutory authority to regulate occupational safety and health would be the dominant agencies in their particular areas, with the OSH Act applying only insofar as the other agencies had not exercised their statutory authority. See *Southern Pacific Transportation Co. v. Usery, supra, 539 F.2d at 391-92.*

As discussed above, the Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. The Coast Guard regulations are directed at protecting

9. For example, prior to the passage of the OSH Act, Congress had enacted the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act, both of which were administered by the Department of the Interior. These statutes have since been superseded by the Federal Mine Safety and Health Act of 1977, *30 U.S.C. § § 801*-960, which is administered by the Department of Labor.



the health and safety of seamen. *Taylor v. Moore-McCormick Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980).* Thus, employers of seamen, such as Dillingham, must look to the Coast Guard regulations for the requirements they must comply with to protect their employees. Under the approach of the majority in Puget Sound, such employers would also be required to compare the Coast Guard regulations with OSHA regulations, determine which conditions of the work environment are not addressed by Coast Guard regulations, and comply with OSHA requirements directed at those working conditions. This approach necessarily assumes that the Coast Guard regulations are insufficient to provide adequate protection to seamen aboard vessels on navigable waters. It is thus inconsistent with the established rule that section 4(b)(1) does not permit an inquiry into the stringency of another agency's exercise of authority. "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." Mushroom Transportation Co., *73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1392, 1973-74 CCH OSHD P16,881 at p. 21,591* (No. 1588, 1973). See also Northwest Airlines, Inc., *80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1990, 1980 CCH OSHD P24,751 at p. 30,489* (No. 13649, 1980); Pennsuco Cement and Aggregates, Inc., *80 OSAHRC 47/A2, 8 BNA OSHC 1378, 1980 CCH OSHD P24,478* (No. 15462, 1980).

The Puget Sound majority's approach also places an unreasonable burden on employers to determine the

requirements with which they must comply. As Commissioner Cleary stated in his separate opinion:

> Such an approach also creates a regulatory labyrinth for employers who must review two sets of federal regulations in detail to determine where there are voids in one set of regulations which are susceptible to application of a standard from another set of regulations. In the ensuing uncertainty the goal of providing employees with a safe and healthful workplace can only suffer.

*9 BNA OSHC at 1782, 1981 CCH OSHD at p. 31,601.*

This case involves an alleged hazard to a seaman arising out of activities aboard a vessel operating on navigable waters. The Coast Guard, an agency with special expertise in maritime hazards, has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. Thus, the Secretary is precluded from enforcing the OSH Act with respect to those working conditions. Moreover, we note that the Coast Guard investigated the incident that led to this case and determined that it did not involve any violation of law or regulation. Nevertheless, the Coast Guard investigation resulted in the recommendation of measures intended to avoid similar incidents in the future.[10] Thus, the dominant agency in

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10. The dissenting opinion suggests that the Coast Guard's investigation may have been an exercise of its deepwater port jurisdiction rather than its jurisdiction over uninspected vessels. However, the fact that the Coast Guard was able to address the (Cont'd)



maritime safety has taken remedial action. Permitting the Secretary to also seek remedial measures through an enforcement action arising out of the same incident would thus result in the very duplication of federal agency effort that section 4(b)(1) is designed to avoid. See *Southern Railway Co. v. OSHRC, supra, 529 F.2d at 339;* Organized Migrants in *Community Action, Inc. v. Brennan, 520 F.2d 1161, 1167 (D.C. Cir. 1975).*

The section 5(a)(1) citation is vacated. SO ORDERED.

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broader problem that the fatal incident revealed does not suggest that it lacks jurisdiction over the cited working condition. If anything, it demonstrates that the Coast Guard is better able than OSHA to focus on the overall problem of safety on navigable waters due to its broad statutory authority over the subject.

*Appendix*

DISSENT BY: COTTINE

DISSENT:

COTTINE, Commissioner, dissenting:

Section 4(b)(1) of the Act, *29 U.S.C. § 653*(b)(1),[1] provides that OSHA is without authority to regulate working conditions covered by another agency when the other agency exercises its "statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." Until recently,[2] the Commission has consistently required that the standards and regulations promulgated by another federal agency address the particular cited working conditions and have the "force and effect of law" in order to preempt OSHA jurisdiction.[3]

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1. Section 4(b)(1) states, in pertinent part, the following:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

2. See Consolidated Rail Corp., *OSAHRC, 10 BNA OSHC 1577, 1982 CCH OSHD P26,044* (No. 79-1277, 1982), petition for review filed, No. 82-3302 (3d Cir. June 28, 1892).

3. E.g., Puget Sound Tug & Barge Co., *81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD P25,373* (Nos. 76-4905 et al., 1981), appeals filed, No. 81-7406 (9th Cir. June 26, 1981) (OSHRC Docket No. 76-4905), No. 81-7405 (9th Cir. June 26, 1981) (OSHRC

(Cont'd)



*Appendix*

As I noted in my separate opinion in Consolidated Rail Corp., *OSAHRC, 10 BNA OSHC 1577, 1982 CCH OSHD P26,044* (No. 79-1277, 1982), petition for review filed, No. 82-3302 (3d Cir. June 28, 1982),

> Congress did not envision a perfunctory preemption of the Act's application under section 4(b)(1). It was well aware that there were other federal agencies concerned with safety and intimately familiar with the regulated industry. Nonetheless, Congress delegated authority for safety and health to OSHA in the absence of an exercise by a sister agency. Congress also provided the Commission with a statutory rule to assess the existence of another agency's exercise.

*10 BNA OSHC at 1583, 1982 CCH OSHD at p. 32,711.* I further noted that Congress recently reiterated its understanding of section 4(b)(1):

> OSHA's standards do not apply when another agency issues standards which affect occupational safety and health and which have the force and effect of law.

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Docket No. 76-5515), and No. 81-4243 (5th Cir. June 24, 1981) (OSHRC Docket No. 78-617) ("Coast Guard cases"); Northwest Airlines, Inc., *80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1980 CCH OSHD P24,751* (No. 13649, 1980) appeal dismissed, No. 80-4222 (2d Cir. Mar. 31,1981).

House Comm. on Gov't Operations, Occupational Safety and Health Protection for Aviation Industry Employees — The Conflict Between FAA and OSHA, H.R. REP. No. 393, 97th Cong., 1st Sess. 2 (1981) (Emphasis added).

*10 BNA OSHC at 1583* n., *1982 CCH OSHD at p. 32,711* n.

The burden of establishing a section 4(b)(1) exemption rests with the party claiming its application. See Puget Sound Tug & Barge Co., *81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD P25,373* (Nos. 76-4905 et al., 1981), and cases cited. The Respondent has not shown that the Coast Guard has the statutory authority to prescribe or enforce standards or regulations with respect to working conditions of employees aboard uninspected vessels other than certain specific conditions regulated by statute,[4] none of which are relevant to the cited condition in this case. Furthermore, the Coast Guard's general authority to investigate marine casualties does not constitute prescription or enforcement of "standards" or "regulations" within the meaning of section 4(b)(1). Puget Sound Tug & Barge Co., supra. Accordingly, my colleagues err in concluding that pursuant to section 4(b)(1) of the Act OSHA is precluded from enforcing the Act with respect to any working conditions aboard vessels in general and the cited working conditions on this vessel in particular.

In recognition of their overlapping authority, the Coast Guard and OSHA have established a cooperative relationship to resolve jurisdictional conflicts. See Part I,

4. See note 7, infra.



infra. The Commission reorders that relationship and leaves certain employees without the protection of any federal safety program in direct conflict with the Act's stated policy of assuring "so far as possible every working man and woman in the nation safe and healthful working conditions," *29 U.S.C. § 651*(b).

I

A.

My colleagues improperly rely on *14 U.S.C. § 2* as support for their conclusion that the Coast Guard has general regulatory authority over uninspected vessels. Since its inception in 1915 the Coast Guard has gradually acquired responsibilities previously assigned to other departments and agencies, including those vessel inspection duties once performed by the Bureau of Marine Inspection and Navigation. See *14 U.S.C.A. § 2* (1956) (Historical Note). Until it was abolished in 1946 the Bureau of Marine Inspection and Navigation conducted statutorily required inspections of vessels. *Pacific Shrimp Co. v. United States Dept. of Transportation, 375 F.Supp. 1036, 1040 (W.D. Wash. 1974)*. Since that time, vessel inspections have been conducted by the Coast Guard.d In 1949, Congress for the first time set forth a codification of the primary functions and responsibilities of the Coast Guard. *14 U.S.C. § 2* lists these primary duties. Id. The purpose of 14 U.S.C. was "to have outlined in general terms in one section the broad scope of the functions of the Coast Guard." Id. However, it is Title 46 of the U.S. Code that contains the "comprehensive pattern of federal legislation designed to insure the safety of marine

equipment" and defines the vessels covered by its provisions. *United States v. Gahagan Dredging Corp., 289 F.2d 639, 642 n. 6 (2d Cir. 1961).* "As is apparent on the face of the legislation . . . the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection." *Huron Portland Cement Co. v. City of Detroit, 382 U.S. 440, 445 (1960).*[5]

Federal inspection of steam vessels was begun in 1838 as a result of a series of disastrous boiler explosions. Id.; S. Rep. No. 886, 96th Cong., 2d Sess. 3292, 3293, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3292, 3393. In 1936, with the enactment of *46 U.S.C. § 367,* diesel propelled seagoing vessels of 300 gross tons and over were made subject to the vessel inspection laws. *Pacific Shrimp Co. v. United States, 375 F.Supp. at 1040.* The vessel involved in this case is a diesel propelled, 33 gross ton tugboat that is not subject to the federal inspection requirements. Cf. *Cargo Carriers, Inc. v. Humphrey, 206 F.2d 488 (D.C. Cir. 1953),* aff'g *Cargo Carriers, Inc. v. Snyder, 104 F.Supp. 258 (D.D.C. 1952).* As the D.C. Circuit observed, the purpose of vessel inspection laws is to promote

5. The Court's recent decision in *Foremost Insur. Co. v. Richardson, 50 U.S.L.W. 4778* (U.S. June 23, 1982), deals with a wrongful death action arising from the collision of two private pleasure boats on navigable waters. The Court simply concluded that the cause of action states a claim within the admiralty jurisdiction of the federal courts. None of the Court's references to the federal "Rules of the Road" promulgated by the Coast Guard, the standards adopted under the Motor Boat Act, or the holding that these regulations are universally applicable to commercial and non-commercial vessels, *50 U.S.L.W. at 4780-1,* has any relevance to this case.



safety at sea and the Coast Guard may properly treat a non-propelled tank barge attached to a 99 ton tugboat as a single unit, so as to impose safety requirements that would be inapplicable to either unit alone. *206 F.2d at 489.*

The parties do not dispute the fact that the vessel involved in this case is not an inspected and certificated vessel. Accordingly, it is unnecessary in this case to reconsider the primary issue in Puget Sound Tug & Barge Co., regarding whether the Coast Guard's exercise of its authority over inspected and certificated vessels is pre-emptive under section 4(b)(1). Nevertheless, my colleagues have overruled Puget Sound and have created an industrywide exemption that is broad enough to encompass even vessels not subject to the Coast Guard's safety regulations for inspected and certificated vessels.

According to a Memorandum of Agreement between OSHA and the Coast Guard on the development of occupational health standards for workplaces aboard inspected vessels,

> The Commandant of the U.S. Coast Guard has statutory authority, under the Marine Inspection Laws, to promulgate and enforce safety and health standards regarding working conditions of employees on vessels subject to Coast Guard inspection and certification.

*45 Fed. Reg. 14739 (1980)* (Emphasis added). Furthermore, according to the Department of Transportation,

> Under *46 U.S.C. 391,* with *46 U.S.C. 375* and 416, the Coast Guard is to issue regulations to ensure

> that inspected vessels have a "structure suitable for service," and "suitable accommodations" for passengers and crew and are, "in a condition to warrant the belief she may be used in navigation * * * with safety to life." . . . Therefore diving regulations for inspected vessels under these mandates would include rules for equipment and working conditions.

*41 Fed. Reg. 29151, 29152 (1976)* (advance notice of proposed rulemaking for commercial diving from vessels and structures that are under Coast Guard jurisdiction) (Emphasis added). However, according to the Commission majority in this case,

> The Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. (Emphasis added.)

My colleagues' holding assigns to the Coast Guard a much wider authority with respect to vessel safety than the Coast Guard has actually asserted.[6]

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6. In determining the extent of an agency's statutory authority to regulate the safety and health of employees, the Commission must give deference to the agency's reasonable interpretation of its own enabling legislation. *Northwest Airlines, Inc., 8 BNA OSHC at 1988, 1980 CCH OSHD P24,751 at p. 30,487.* Although in Puget Sound the Coast Guard claimed it was vested with "regulatory jurisdiction over inspected vessels", Coast Guard Brief at 5, it specifically disavowed sole regulatory jurisdiction over other vessels. At the oral argument in the Puget Sound case on April 17, 1979, the following dialogue was recorded:

(Cont'd)



According to the Department of Transportation,

> The Coast Guard has extensive authority to regulate safety of life and property on vessels certified by the Coast Guard . . . Vessels under Coast Guard jurisdiction include vessels required to be certificated by the Coast Guard, regardless of their geographic location, including mobile offshore, semi-submersible drilling units. Facilities [under Coast Guard jurisdiction] include deepwater ports. . . .

*40 Fed. Reg. 33681 (1975)* (advance notice of proposed rulemaking for marine occupational safety and health standards

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> CHAIRMAN CLEARY: Would you claim sole jurisdiction over safety and health on all vessels?
>
> LT. WOEPPEL: No. As I started out, inspected vessels are solely what I'm dealing with —
>
> CHAIRMAN CLEARY: Inspected vessels.

Transcript at 66. The Coast Guard representative further stated, with respect to the Coast Guard's interpretation of its regulatory authority:

> LT. WOEPPEL: . . . [I]t doesn't involve a lot of statutory interpretation or the agency or the Department doesn't have to do a lot of work in order to determine if these vessels are subject to regulation. The statutes are clear on what they cover in terms of types of vessels.

Transcript at 58.

for vessels and facilities under Coast Guard jurisdiction) (Emphasis added); see also *41 Fed. Reg. 29151, 29152 (1976)* (DOT advance notice of proposed rulemaking for commercial diving from vessels and structures that are under Coast Guard jurisdiction). Nevertheless, my colleagues conclude the following:

> [t]he Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. [Emphasis added.]

In a "Memorandum of Agreement on Occupational Health Standards for Workplaces Aboard Inspected Vessels" issued jointly by OSHA and the Coast Guard, the agencies stated:

> Because both USCG and OSHA have statutory authority within the maritime industry, cooperation between the agencies is essential in the area of health standards development.

*45 Fed. Reg. 14739 (1980).* However, according to the Commission majority,

> The Coast Guard, an agency with special expertise in maritime hazards, has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. Thus, the Secretary is precluded from enforcing the OSH Act with respect to those working conditions.



In Puget Sound, the Commission accepted the Coast Guard's amicus argument that pursuant to its statutory authority the Coast Guard has developed its own regulatory scheme to promulgate and enforce standards regarding working conditions on vessels subject to Coast Guard inspection and certification.[7] The Coast Guard cases involved inspected and certificated vessels. This case does not involve an inspected and certificated vessel and, according to the Coast Guard's statement of authority and its enforcement activity, the vessel is not subject to the Coast Guard's general safety inspection and enforcement program.[8]

II

The narrow question presented by this case is whether the casualty and accident reporting requirements for uninspected vessels set forth at 33 C.F.R. Part 173 and the Coast Guard's general authority to investigate fatalities under *49 U.S.C. § 239* are preemptive "standards or regulations

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7. The uninspected vessel regulations in 46 C.F.R. Chap. 1, subchap. C do not derive from the Coast Guard's general authority to prescribe regulations for promotion of "safety to life" under *46 U.S.C. § § 391* & 395. Rather, they apply a limited number of specific uniform boating standards for all vessels pursuant to the Congressional directives set forth in the Federal Boat Safety Act of 1971, *46 U.S.C. § § 1451*-1489, and the Motorboat Act of 1940, as amended, *46 U.S.C. § § 526*-526(t), that certain specific conditions be uniformly regulated for all vessels, e.g. fire protection and lifesaving appliances. See 46 C.F.R. § § 24.01-1 and 24.01-10.

8. See Puget Sound Tug & Barge Co., supra; *45 Fed. Reg. 13739 (1980); 41 Fed. Reg. 29151, 29152 (1976); 40 Fed. Reg. 33681 (1975).*

affecting occupational safety or health" within the meaning of section 4(b)(1).

The Coast Guard's post-accident authority to investigate marine casualties does not constitute prescription or enforcement of "standards" or "regulations" having the force and effect of law within the meaning of section 4(b)(1).[9] Puget Sound Tug & Barge Co., supra; see Consolidated Rail Corp., supra (Cottine, Commissioner, dissenting in part and concurring in part); Northwest Airlines, Inc., supra.[10] Furthermore, it is anomalous to conclude that Congress intended the Act's enforcement to be preempted by a sister agency's limited authority to investigate the cause of injuries or fatalities at a worksite and recommend safety measures when "the goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." *Mineral Industries & Heavy Constr. Group v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981),* cited

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9. Contra *Dunlop v. Avondale Shipyards, Inc., No. 75-1874 (E.D.La. 1976) (3 BNA OSHC 1950, 1975-76 CCH OSHD P20,415);* see *Taylor v. Moore-McCormack Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling & Exploration Co., 609 F.2d 1120* (5th Cir. 1980.

10. The majority concludes that the investigation following the fatality in this case illustrates that the Coast Guard's authority to investigate accidents and enforce regulations applies to uninspected vessels. However, my colleagues fail to note that the Respondent did not participate in the investigation beyond the filing of the accident report. It is just as likely that the Fourteenth Coast Guard District was exercising its deep-water port safety jurisdiction, see *41 Fed. Reg. 29151, 29152 (1976); 40 Fed. Reg. 33681 (1975),* over the HIRI Anchorage in the Pacific Ocean off Barbers Point, Oahu, Hawaii. See 33 C.F.R. § § 3.70, 110.236.



in Faultless Div., Bliss Laughlin Indus., Inc., No. 81-1740, slip op. at 12 (7th Cir. Mar. 30, 1982).

III

A.

The mere potential for duplicative or conflicting enforcement activity does not preempt OSHA jurisdiction. Instead, other mechanisms exist for cooperative resolution of conflicts resulting from overlapping jurisdiction and apparently have been employed by OSHA and the Coast Guard on more than one occasion. For example, in recognition of OSHA's general safety and health authority under the Act and the Coast Guard's authority under the Marine Inspection Laws over vessels subject to inspection and certification, the two agencies entered into a "Memorandum of Agreement on Occupational Health Standards for Workplaces Aboard Inspected Vessels." *45 Fed. Reg. 14739 (1980).* Second, appended to OSHA's Emergency Temporary Standard on Diving Operations, 29 C.F.R. § 1910.401 (1977), *41 Fed. Reg. 24272 (1976),* was a Memorandum of Understanding between OSHA and the Coast Guard providing for joint inspection of inspected vessels, enforcement of OSHA diving standards pursuant to the Act, joint rulemaking procedures for permanent standards, and termination of the Memorandum of Understanding upon the effective date of Coast Guard diving standards. *Id. at 24291* app.[11] On July 22, 1977, OSHA published its final commercial

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11. If, as my colleagues maintain, an industrywide exemption under section 4(b)(1) existed with respect to all vessels in navigation, the Act would have been unenforceable and the Memorandum of Understanding would be a legal nullity. See also congressional discussion of diving standards in Part III-B, infra.

diving standards. *42 Fed. Reg. 37668 (1977)*. On November 16, 1978, the Coast Guard published "regulations governing commercial diving operations from vessels and facilities including vessels required to have a Certificate of Inspection." *43 Fed. Reg. 53678 (1978)*. In the preamble the Coast Guard acknowledged a conflict between the two agencies on decompression chamber requirements and stated:

> [T]he Coast Guard agrees with the general philosophy of the commentators regarding a single Federal standard for the same marine activity and has been discussing the subject with OSHA to resolve the issue.

*43 Fed. Reg. at 53680.*

Clearly, the Coast Guard is aware of its jurisdictional overlap with OSHA and recognizes that OSHA regulations are enforceable unless and until the Coast Guard regulations addressing the particular working conditions are effective. The Coast Guard's understanding of the application of section 4(b)(1) is consistent with the Commission's view in Puget Sound. For example, OSHA diving regulations are no longer applicable to inspected vessels and other facilities that are subject to Coast Guard diving regulations. However, they are applicable to uninspected vessels and facilities not regulated by the Coast Guard. The Coast Guard apparently views cooperation between the two agencies with statutory jurisdiction as the appropriate means of resolving conflicts. Furthermore, as is discussed in part III-B, infra, Congress has the same understanding. Under the majority's view in this case any conflict would be resolved by eliminating



OSHA jurisdiction, whether or not the Coast Guard regulations are enforceable with respect to the working conditions involved.

B.

The cooperative efforts between the Coast Guard and OSHA in the development of standards for vessels and activities not highly regulated by the Coast Guard were reported to the Commission by the Coast Guard in its amicus brief in Puget Sound, the only proceeding in which the Commission invited Coast Guard amicus participation. This interagency cooperation and the need to continue the same was noted in the House report on the Outer Continental Shelf Lands Act Amendments of 1978:

> The committee determined that special provision should be be made as to worker's safety regulation and enforcement on the OCS. Section 4(e) [*33 U.S.C. § 1333*(e)] of the OCS Act of 1953 provided that the Coast Guard had the responsibility for the safety of any person, which would include occupational safety on OCS facilities and in adjacent waters.
>
> The Occupational Safety and Health Act *(29 U.S.C. 651)* provides authority for the Secretary of Labor, through the Occupational Safety and Health Administration, to prepare interim worker's safety regulations and standards and, unless ousted by another agency or department, permanent standards, for all areas including the Shelf.

The committee is aware of a continuing controversy as to whether OSHA or the Coast Guard should exercise regulatory authority over OCS worker's safety and health.

Some witnesses suggested that OSHA, within the Department of Labor, be given sole responsibility, or at least lead agency authority as to worker's safety. Others opposed any agency other than Coast Guard being involved.

Representatives of Coast Guard and OSHA detailed to the committee their cooperative efforts to promulgate and enforce worker's safety rules. For example, Coast Guard and OSHA have recently worked together to prepare final standards on commercial diving operations, applicable to OCS and non-OCS activities. *41 Fed. Reg. 37650-37674* (July 22, 1977). These standards were formally promulgated by the Department of Labor.

As a practical matter, both OSHA and the Coast Guard will continue to function on the OCS. OSHA has prepared not only divers standards but also numerous general industry and construction standards currently in force in the OCS. OSHA and the Coast Guard have each trained diving inspectors. OSHA will maintain responsibility for health standards, even if final safety standards are promulgated by Coast Guard. OSHA administers a comprehensive health and safety law which





establishes a "general duty" to maintain a safe place of work and there is no corresponding responsibility under Coast Guard enabling legislation. OSHA will always be in the position of filling in the gaps in the regulatory effort of the Coast Guard.

Subsection (c)(2) intended to avoid possible interagency conflict and duplication of effort. Specifically, by overruling the "ousting language" of the Occupational Safety and Health Act, OSHA and Coast Guard are to coordinate activity to prepare and enforce regulations so as to avoid duplication and maximize employee protection. Without such a provision, duplication and conflict might occur.

For example as to diving operations, Coast Guard could by existing law regulate safety and OSHA health; yet as a practical matter, in the field, health and safety often merge in a single operation. Similarly under existing law, Coast Guard would protect the safety of divers below the surface and OSHA protect the deck crew.

The committee believed that the best way to resolve this problem is not the status quo which has led to confusion, litigation and employee resistance. Rather it is to give clear direction to the administration to develop interagency cooperative arrangements and resolve all jurisdictional conflicts. Thus, this subsection was

> included, not giving lead agency responsibility to OSHA, not infringing on Coast Guard jurisdiction, but providing authority for both to work together.

H. Rep. No. 590, 95th Cong., 2d Sess. 157-8 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1450, 1563-4.

The Outer Continental Shelf Lands Act of 1953 contained an internal conflict between the safety responsibilities of the Coast Guard, set forth at *33 U.S.C. § 1333*(e), and that of the Department of Labor, set forth at *33 U.S.C. § 941*. The statute was amended in 1958 so as to grant sole authority to the Coast Guard as to matters within the scope of *43 U.S.C. § 1333*(e). See *Pure Oil Co. v. Snipes, 293 F.2d 60, 66-8 & n. 8-12 (1961)*. Subsequently, the Occupational Safety and Health Act of 1970 was enacted, assigning to the Department of Labor general authority to provide employees with safe and healthful workplaces. In its review of the background to OCS related legislation, the 1978 House report noted:

> The Department of Labor and the Department of Health, Education, and Welfare. — Both Departments have responsibilities under the Occupational Safety and Health Act of 1970. HEW makes evaluations of working conditions and provides technical assistance to employers. The Labor Department is responsible for establishing and enforcing interim and some final rules established to provide employees with a safe working environment. OSHA retains jurisdiction



> over issues which are not specifically regulated by the U.S. Coast Guard or U.S. Geological Survey. OSHA has no regulations which pertain solely to the OCS, but it does have a new diving standard, still subject to modification, which does directly affect operations in this area. All OSHA General Industry, Construction, and Maritime Standards have general applicability on the OCS. Currently OSHA, USGS and USCG are attempting to clarify overlapping jurisdictions and regulations.

— H. Rep. No. 590, supra, at 61, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 1468.

With respect to general OCS safety responsibility and overlapping OSHA-Coast Guard authority, the House Conference Report on the Outer Continental Shelf Lands Act Amendments noted the following:

> In adopting the language providing for OCS workers' safety regulations to be promulgated by the Coast Guard, and also providing for the existing authority of the Secretary of Labor (through the Occupational Safety and Health Administration) as to workers' safety to be retained, the Conferees clearly intend neither to reduce, nor to add to existing OSHA authority, under section 466(1) [sic] of the Occupational Safety and Health Act.

This section merely requires the Coast Guard to undertake expedited action where it deems it necessary to regulate hazards currently unregulated by the Government. Under its existing authority, and section 4(b)(1) of the Occupational Safety and Health Act, the Coast Guard may take any appropriate action necessary to regulate any hazard, and may over time displace the applicability of OSHA standards to other working conditions through exercise of appropriate rulemaking actions. However, the conferees intend that consultation with OSHA in standards development and administration, and opportunity for participation by interested parties in any such Coast Guard action, will assure that employees receive no less protection than under existing standards. Consistent goals contained in recent OSHA-Coast Guard agreements - maximizing the safety and health protection of employees, avoiding duplication of effort, and avoiding undue burden on the maritime industry - are also endorsed by the confereees.

H. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 110, reprinted in 1978 U.S. CODE CONG. & AD. News 1674, 1709.

There is no doubt that Congress recognizes existing overlapping jurisdiction, recognizes that OSHA authority is preempted only by a Coast Guard exercise of authority over specific working conditions, and endorses the ongoing cooperative efforts of OSHA and the Coast Guard to resolve jurisdictional conflicts while providing for the safety and



health of employees. It is also clear that Congress views continued OSHA jurisdiction over unregulated safety and health matters to be preferred over the type of industrywide exemption my colleagues have endorsed by their decision in this case.

IV

The administrative law judge below concluded "that the preemptive provisions of section 4(b)(1) of the Act do not apply to the instant conditions." ALJ slip op. at 15. He based his holding on his conclusion that the "Coast Guard has not promulgated and does not enforce regulations and standards governing safe working conditions for a seaman working on an uninspected tugboat." ALJ slip op. at 19. The judge's decision should be affirmed.

JUN 11 2001

No. 00-927

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IN THE

# Supreme Court of the United States

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ELAINE L. CHAO, SECRETARY OF LABOR,
*Petitioner*,

v.

MALLARD BAY DRILLING, INC.,
*Respondent*.

---

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## BRIEF *AMICUS CURIAE* OF THE TRANSPORTATION INSTITUTE IN SUPPORT OF THE RESPONDENT

---

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IN THE

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF *AMICUS CURIAE* OF THE TRANSPORTATION INSTITUTE IN SUPPORT OF THE RESPONDENT [1]

## INTEREST OF *AMICUS* [2]

The Transportation Institute is a Washington D.C.-based non-profit organization dedicated to maritime research, education, and promotion. The Institute supports a wide range of programs that promote the strength of America's maritime capability. The Institute believes that the decision under review properly recognized the primary role of the

[1] Pursuant to Rule 37.6 of this Court, *amicus* certifies that no counsel for any party to this case authored this brief, in whole or in part, and that no one outside The Transportation Institute made a monetary contribution to the brief's preparation or submission.

[2] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

United States Coast Guard in regulating vessel safety, and that insertion of the Occupational Safety and Health Administration (OSHA) into this area would introduce conflict, uncertainty, and duplication that Congress never intended.

The Institute's member companies participate in all phases of the nation's deep sea, foreign and domestic shipping trades, and barge and tugboat operations on the Great Lakes and on the 25,000 mile network of America's inland and coastal waterways. They operate vessels that are required by statute to be inspected by the United States Coast Guard ("inspected vessels"), and vessels not subject to a statutory inspection requirement ("uninspected vessels"). The uninspected vessels include tugs, barges, and survey, crew, supply, and dredging vessels. All vessels operated by the Institute's member companies are U.S. registry—crewed by American citizens, operating under the world's highest safety standards, and proudly flying the American flag.

The Transportation Institute has a strong interest in ensuring that America develops a maritime policy that maintains a viable, balanced, safe, and dependable water transportation capability. To this end, the Institute seeks the continued growth and modernization of America's waterway infrastructure. The Institute monitors the activities of the federal and state governments, and their administrative agencies, as they affect waterborne transportation. The Institute plays a prominent role in national forums, seminars, and public policy meetings where questions of maritime policy are under scrutiny.

The position taken by the Petitioner regarding the purported authority of OSHA to regulate all uninspected vessels contravenes statutory provisions reflecting Congress' long-standing policy decision that the U.S. Coast Guard regulate the working conditions of seamen onboard vessels. The remedy sought would add a layer of regulation on



maritime workers and companies that was never envisioned, and that would be developed and enforced by individuals with no concept of life in a maritime environment. The Transportation Institute respectfully submits that such a result would impede rather than promote maritime safety, and impose a level of costs and uncertainty on the industry that would serve no useful purpose.

## SUMMARY OF ARGUMENT

Petitioner understates the level of Coast Guard regulation of uninspected vessels, and incorrectly state that only "very limited" safety regulation applies to all uninspected vessels. The 1983 Memorandum on Understanding (MOU) between the Coast Guard and OSHA applies only to inspected vessels, and does not address uninspected vessels. It does not follow, however, that all uninspected vessels thereby fall under OSHA's jurisdiction, or that the question of OSHA's jurisdiction can be resolved by some separate understanding between the two agencies.

The Coast Guard, under proper authority, has issued numerous safety regulations that apply to uninspected vessels. These are not limited to the safety equipment required by statute to be provided on these vessels (such as fire extinguishers, means of ventilation, and emergency locating equipment), but also include items such as guards, ladders, rails, and gangway lifelines; fuel tank ventilation; and pollution prevention regulations. These regulations also do not apply uniformly to all uninspected vessels. Many of these regulations have been issued since the MOU was signed in 1983, reflecting the Coast Guard's attention to the safety regulation of uninspected vessels. The Fifth Circuit's decision properly recognizes the primacy of the Coast Guard's regulatory authority.

Congress has also recognized the primacy of the Coast Guard's role by providing that any delegation of the maritime

safety and commerce functions of the shipping laws, including regulation of uninspected vessels, be made exclusively to the Coast Guard. Inserting OSHA into the regulation of uninspected vessels would be inconsistent with this expression of Congressional intent.

## ARGUMENT

### I. COAST GUARD REGULATION OF UNINSPECTED VESSELS IS BROAD AND PERVASIVE, PRECLUDING JURISDICTION IN THIS AREA BY OSHA.

Petitioner's argument that OSHA should be given a role in the regulation of uninspected vessels relies heavily on the assertion that the Coast Guard's authority in this area is extremely limited. *See, e.g.*, Petitioner's Brief at 4-5 n.1. Petitioner thus argues that OSHA regulation is necessary to avoid risk to the safety and health of workers on these vessels. *See id.* at 35.

Contrary to the impression left by the Petitioner's brief, however, the Coast Guard has issued a series of appropriate regulations under its authority that are applicable to uninspected vessels and to seamen working on uninspected vessels. These cover many diverse areas of safety. Moreover, these regulations do not apply uniformly to all types of uninspected vessels, demonstrating that the Coast Guard has exercised its judgment as to its regulation of this area.

A comprehensive list of these regulations is appended to this brief. They include guards, ladders, rails, and gangway lifelines (46 C.F.R. § 92.25 (2000)); fuel tank vents (46 C.F.R. § 56.50-85 (2000)); and pollution prevention (33 C.F.R. pt. 155 (2000)).

Many of these regulations have been established or amended since the Coast Guard and OSHA entered into the MOU that Petitioner now asserts allows OSHA regulation of



uninspected vessels. For example, 33 C.F.R. pt. 160 (2000), which governs ports and waterways safety, is expressly made applicable to all vessels, including uninspected vessels. 33 C.F.R. § 160.103 (2000). These regulations were originally placed into effect in 1983 but have been amended in 1988, 1994, 1996, 1997, and 1998. Among other things, they authorize the Coast Guard to deny entry to any port or place within the jurisdiction of the United States to any vessel that fails to comply with Port and Tanker Safety Act or its regulations (33 C.F.R. § 160.107 (2000)); they authorize the Coast Guard to issue special orders to vessels to operate as it directs (33 C.F.R. § 160.111 (2000)); they authorize the Coast Guard to prohibit any vessel that it believes unsafe from operating on the navigable waters (33 C.F.R. § 160.113 (2000)); and they authorize the Coast Guard to establish safety zones (33 C.F.R. § 160.5 (2000)).

The Coast Guard has thus exercised and continues to exercise its statutory mandate to cover safety aspects of all vessels, including uninspected vessels. 14 U.S.C. § 2 requires the Coast Guard to "promulgate and enforce regulations for the promotion of safety of life and property on . . . waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive agency." The Fourth Circuit has construed this statute to establish

> . . . a delineation of responsibility between the Coast Guard and Secretary of Labor in this area: the Coast Guard has responsibility for the safety of "seamen" under regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive.

*Taylor v. Moore-McCormack Lines, Inc.*, 621 F.2d 88, 92-93 (4th Cir. 1980).

Sound practical reasons also support the conclusion that OSHA's authority should not be extended to the regulation of uninspected vessels. As the Fifth Circuit has noted,

> Section 4(b)(1) [of the OSHA Act, 29 U.S.C. § 653 (b)(1)] evidences a general congressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise.

*Donovan v. Texaco, Inc.*, 720 F.2d 825, 827 (5th Cir. 1983).

Allowing OSHA into the area of maritime safety regulation under the test proposed by the Petitioner would require seamen and employers to ascertain whether the Coast Guard had either issued a regulation that applied or might be considered to apply to a given "working condition" on a particular vessel or had determined not to do so. Each exercise of OSHA's authority would require a thorough analysis, based on a complete record, as to the extent of the Coast Guard's regulation of the particular type of vessel involved and of the relationship between OSHA and Coast Guard regulation.

Moreover, unless sufficient scope and space were given to the Coast Guard's issuance of regulations or to its decisions not to regulate, considerable uncertainties would also continue as to the permissible scope of OSHA's authority. Allowing OSHA to regulate on the basis that a particular working condition had not been expressly addressed by the Coast Guard would lead to ultimately indeterminate assessments as to what constituted a "working condition" and as to the relationship between each regulation and the operations of the vessel. These burdens are eliminated by the delineation of a distinct sphere for regulation of vessels and seamen by the Coast Guard, where it has historically resided.



The harms of duplicative OSHA regulation are considerably heightened in the context of the regulation of seamen aboard vessels on navigable waterways. As this Court recently noted, "Congress has legislated in the field [of maritime commerce] from the earliest days of the Republic, creating an extensive statutory and regulatory scheme." *United States v. Locke*, 529 U.S. 89, 108 (2000). The living and working conditions of seamen have historically been the subject of regulation under the shipping laws down to the minutest detail, in recognition of the uniqueness of a seamen's status. *See Donovan*, 720 F.2d at 828.

The Coast Guard, as the nation's maritime safety agency, has also developed expertise with respect to the safety of vessels and seamen that OSHA simply does not possess. Indeed, in the present case, the Coast Guard undertook all aspects of the investigation concerning the vessel and the competency of the crew. Although the ALJ found that OSHA had conducted a "limited" investigation, he also noted that OSHA did not make any inspection of the barge or interview any of the crew. ALJ Op. at 4-5, found in Petition for a Writ of Certiorari, Appendix B, at 11a-12a.[3] OSHA's role was thus essentially limited to issuing the citations.

Allowing OSHA to undertake partial regulation of uninspected vessels would ignore the fact, which this Court also recognized in *Locke*, that vessels operate as integrated systems. 529 U.S. at 112 (noting that limited state regulation

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[3] Respondent has noted that OSHA undertook no investigation: "OSHA, on the other hand, and in particular, its investigator, Mike Sophrer, conducted no investigation into this casualty. To quote Mr. Sophrer, he 'stayed in the background' and did not personally interview any Mallard employees nor did he ever step foot aboard the MR. BELDON to conduct an actual inspection of the vessel itself. In short, he did nothing but 'ride the coattails' of the investigation by the United States Coast Guard." Respondent's Brief in Opposition to the Petition for Writ of Certiorari at 2.

of "local peculiarities" would not "require adjustment of systemic aspects of the vessel"). Giving OSHA a role with respect to the regulation of uninspected vessels would require at best an extremely burdensome and difficult assessment of the relationship of the OSHA requirements to the overall operation of the vessel. Indeed, the reasoning that OSHA may regulate uninspected vessels in any area in which the Coast Guard has not expressly regulated or determined not to regulate could be applied as well to OSHA regulation of inspected vessels; yet all parties agree that OSHA has no proper role with respect to inspected vessels.

Finally, dual regulation would be particularly difficult for operators who operate both inspected and uninspected vessels, as do many of the Institute's members. These operators often comply on all of their vessels with the requirements applicable to inspected vessels. Under the Petitioner's approach, however, operators taking this approach would find themselves subject to another layer of regulation by OSHA as well.

In sum, OSHA regulation simply would not fit with the statutory and regulatory scheme applicable to uninspected vessels. Were it to be applied, the result at best would be detailed and indeterminate assessments with respect to each type of uninspected vessel as to the permissible limits of OSHA regulations.

## II. ALLOWING OSHA TO REGULATE WORKING CONDITIONS OF SEAMEN ON UNINSPECTED VESSELS WOULD BE INCONSISTENT WITH CONGRESS' DETERMINATION TO MAKE THE COAST GUARD THE EXCLUSIVE AUTHORITY TO REGULATE VESSELS AND SEAMEN UNDER THE SHIPPING LAWS.

In 1983, Congress revised and consolidated the shipping laws, combining all of the statutes governing "vessels and seamen" into Subtitle II of Title 46 of the U.S. Code. Pub. L. 98-89, 97 Stat. 501. In doing so, Congress expressly provided that all of the duties and powers conferred by that Subtitle, including any rulemaking authority governing vessels and seamen, could be delegated only to the Coast Guard. 46 U.S.C. § 2104(a).



A 1997 decision of the District of Columbia Circuit confirmed that 46 U.S.C. § 2104 limits delegation of Subtitle II functions to the United States Coast Guard. *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997). The D. C. Circuit held that Section 2104 expresses Congress' plain intent that the seamen's safety and welfare functions of the shipping laws should be exclusively the province of the Coast Guard as the nation's maritime safety agency, unless the Secretary chose to retain those duties. 129 F.3d at 185. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 362 (3d Cir. 1993)("The significance of the public policy implicated here is highlighted by Congress' decision to authorize a specific agency, the Coast Guard, to oversee and ensure maritime safety, 46 U.S.C. §§ 2103, 2104 (1988), just as it created the FAA to promote aviation safety . . .").

Allowing duties or powers related to seamen's safety to be delegated to OSHA would be inconsistent with the policy expressed in 46 U.S.C. § 2104 to center these safety and welfare functions in the Coast Guard. The regulation of working conditions on uninspected vessels directly affects seamen subject to regulation under Title II, and is most properly the subject of regulation by the Coast Guard.

Moreover, the Coast Guard's acquiescence in OSHA's regulation of uninspected vessels cannot provide OSHA with regulatory authority in contravention of this policy. *Amicus* in support of Petitioner contends, for example, that because OSHA and the Coast Guard are "united" in their view of this case, "this Court is not being asked to resolve a conflict over regulatory 'turf' between the Department of Labor and OSHA on the one hand and the Department of Transportation and the

Coast Guard on the other." *Amicus Curiae* Brief of the Association of Trial Lawyers of America at 10. But an agreement between the Coast Guard and OSHA, whatever its origin or purpose, cannot resolve the question as to whether allowing OSHA to regulate in this area is proper.

## CONCLUSION

For the reasons stated above, The Transportation Institute respectfully submits that the judgment should be affirmed.

Respectfully submitted,

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June 11, 2001

# APPENDIX

# APPENDIX

## LIST OF REGULATIONS THAT APPLY TO UNINSPECTED VESSELS

| | |
|---|---|
| Navigation Lights & Signals | 33 C.F.R. pt. 81 (2000) |
| Pollution Prevention Regulations | 33 C.F.R. pt. 155 (2000) |
| Equipment Test Records | 33 C.F.R. pt. 156 (2000) |
| Marine Sanitation Devices | 33 C.F.R. pt. 159 (2000) |
| Ports & Waterways Safety | 33 C.F.R. pt. 160 (2000) |
| Navigation Publications & Equipment | 33 C.F.R. pt. 164 (2000) |
| Drug & Alcohol Testing | 46 C.F.R. pt. 16 (2000) |
| Uninspected Vessels – General Provisions | 46 C.F.R. pt. 24 (2000) |
| Life Preservers & Other Lifesaving Equipment | 46 C.F.R. § 25.25 (2000) |
| Emergency Position Indicating Radio Beacons | 46 C.F.R. § 25.26 (2000) |
| Fixed Fire Extinguishing Gear | 46 C.F.R. § 25.30 (2000) |
| Backfire Flame Control | 46 C.F.R. § 25.35 (2000)<br>46 C.F.R. § 25.40 (2000)<br>46 C.F.R. § 25.45 (2000)<br>46 C.F.R. § 25.50 (2000) |
| Special Operating Requirements | 46 C.F.R. § 26.03 (2000) |
| Notice & Reporting of Casualty & Voyage Records | 46 C.F.R. § 26.08 (2000) |
| Boarding | 46 C.F.R. § 26.15 (2000) |
| Work Vest | 46 C.F.R. § 26.30 (2000) |
| Towing Vessels | 46 C.F.R. pt. 27 (2000) |
| Commercial Fishing Industry Vessels | 46 C.F.R. pt. 28 (2000) |
| Hull Structure | 46 C.F.R. § 42.09 (2000)<br>46 C.F.R. § 42.15 (2000) |
| Guards, Ladders, Rails & Gangways Lifelines | 46 C.F.R. § 42.15-75 (2000) |
| Boilers | 46 C.F.R. pt. 52 (2000) |
| Fuel Tank Vents | 46 C.F.R. § 56.50-85 (2000) |
| Auxiliary Machinery | 46 C.F.R. pt. 58 (2000)<br>46 C.F.R. pt. 61 (2000) |
| Thermal Fluid Heaters | 46 C.F.R. pt. 61 (2000) |
| Liquefied Flammable Gas Systems for Heating/Cooking | 46 C.F.R. § 61.15-10 (2000) |

| | |
|---|---|
| Hull Marks | 46 C.F.R. § 67.121 (2000)<br>46 C.F.R. § 67.123 (2000) |
| General Alarms | 46 C.F.R. § 113.25 (2000) |
| Annual Liferaft Servicing | 46 C.F.R. § 160.151-57(p) (2000) |
| Lifejackets | 46 C.F.R. § 199.620 (2000) |